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OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE

PRESIDENT OF THE UNITED STATES, THE ATTORNEY GENERAL

AND OTHER EXECUTIVE OFFICERS OF THE FEDERAL GOVERNMENT

IN RELATION TO

THEIR OFFICIAL DUTIES

EDITOR
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Foreword

The Attorney General has directed the Office of Legal Counsel to publish selected opinions on an annual basis for the convenience of the executive, legislative, and judicial branches of the government, and for the convenience of the professional bar and the general public.* The first three volumes of opinions published covered the years 1977 through 1979; the present volume covers primarily 1980. The opinions contained in Volume 4 include some that have previously been released to the public, additional opinions as to which the addressee has agreed to publication, and opinions to Department of Justice officials that the Office of Legal Counsel has determined may be released. A substantial number of Office of Legal Counsel opinions issued during 1980 are not included.

The authority of the Office of Legal Counsel to render legal opinions is derived from the authority of the Attorney General. Under the Judiciary Act of 1789 the Attorney General was authorized to render opinions on questions of law when requested by the President and the heads of executive departments. This authority is now codified at 28 U.S.C. §§ 511-513. Pursuant to 28 U.S.C. § 510 the Attorney General has delegated to the Office of Legal Counsel responsibility for preparing the formal opinions of the Attorney General, rendering informal opinions to the various federal agencies, assisting the Attorney General in the performance of his function as legal adviser to the President, and rendering opinions to the Attorney General and the heads of the various organizational units of the Department of Justice. 28 C.F.R. § 0.25.

Included in Volume 4 are 11 formal Attorney General opinions issued during 1980. These opinions will eventually appear in Volume 43 of the Opinions of the Attorneys General. In light of the long interval between volumes in that series (*e.g.,* Volume 42 covers the years 1961 through 1974), the Attorney General has determined that it would be appropriate and useful to inaugurate the practice of including formal opinions of the Attorney General in the annual volumes of Office of Legal Counsel opinions.

Also included in Volume 4, as a separate section with its own foreword, are 25 opinions dealing with the issues which arose out of

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*The Editor acknowledges the assistance of Joseph Foote, Esq., in preparing these opinions for publication.

the seizure on November 4, 1979 of the U.S. Embassy in Tehran and the taking of 52 American hostages. These opinions were issued over a 15-month period between November of 1979 and February of 1981, and include two formal Attorney General opinions.

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Constitutionality of Affording Reduced Postal Rates to Committees of the Major Political Parties

The Postal Service acted within its authority, under 39 U.S.C. § 3626 and other applicable statutes, when it limited special bulk third-class rates to committees of the major political parties.

An argument can be made that a differential postal rate subsidy is analogous to the differential public campaign financing restrictions upheld against constitutional challenge in *Buckley* v. *Valeo*, 424 U.S. 1 (1976); however, the subsidy differential at issue here is more problematic than the scheme held constitutional in *Buckley*, because it significantly burdens minor political parties without giving them any countervailing advantages.

An appropriations proviso that encourages a one-time administrative differential among political parties, and avowedly favors the major parties at the expense of all others, may be more difficult to justify than the statutory scheme upheld in *Buckley*, which was neutral in its long-term application.

January 4, 1980

MEMORANDUM OPINION FOR THE POSTMASTER GENERAL

This responds to your letter to the Attorney General asking our advice concerning whether there is a failure of appropriations in FY 1980 for special third-class rates for political committees other than those of the major parties, and if so, whether an adjustment of rates by the Board of Governors under 39 U.S.C. § 3627 to provide higher rates for all other parties would raise serious constitutional questions. It is our understanding that at the Board's December meeting, it determined that a failure of appropriations had occurred, and adjusted the rates for parties other than the Republicans and Democrats to the regular commercial rate, producing a differential of 5.3 cents per letter-size piece. We concur that a failure of appropriations within the meaning of § 3627 has occurred. We conclude that the present rate differential between the major parties and others is not clearly unconstitutional, although it does raise a serious constitutional question.

I. Relevant Statutory Provisions and Their Legislative History

In 1978, 39 U.S.C. § 3626 was amended by adding a new subsection (e), providing that third-class mail of a "qualified political committee" shall be charged the rates currently in effect for third-class mail of a nonprofit organization. Pub. L. No. 95-593, 92 Stat. 2538. The amendment went on to define qualified political committees as national or state committees of "a political party." The effect of this provision was therefore to provide a substantial subsidy to political parties without discriminating among them.

The Postal Service Appropriation Act, 1980, Pub. L. No. 96-74, 93 Stat. 562 (1979), added a proviso to the general appropriation for the Postal Service:

> [p]rovided, that no funds appropriated herein shall be available for implementing special bulk third-class rates for "qualified political committees" authorized by Public Law 95-593, other than the National, State, or congressional committee of a major or minor party as defined in Public Law 92-178, as amended.

By referring to the definitions of the Presidential Election Campaign Fund Act of 1971, the proviso limited appropriations to use for reduced rates for parties receiving at least 5 percent of the popular vote in the preceding presidential election, a category that in application includes only the Democratic and Republican parties. *See* 26 U.S.C. § 9002 (6)(7).

The source of the proviso was a floor amendment to the Appropriations Act in the House of Representatives, *see* 125 Cong. Rec. H5888-96 (daily ed. July 13, 1979). Therefore, legislative history for it is limited to the colloquy on the floor that day. The amendment originated as a proviso blocking appropriations of special rates for all qualified political committees within the meaning of the 1978 legislation. Its purpose was the straightforward one of ending a major subsidy to political parties generally. The proposal sparked the immediate reaction that it was unfair to allow special rates for such nonprofit groups as special interest lobbyists, but to deny them to the major political parties. Accordingly, an amendment to the amendment was offered in order to preserve appropriations for the major parties. The technique was to use the definitions of the election financing law, in recognition that the effect of these definitions would be to allow appropriations for special rates for the Republicans and Democrats, but not for other parties. It was also made clear (after some confusion) that the effect of the proviso would not be directly to ban reduced rates for parties other than the major ones, but would be to trigger 39 U.S.C. § 3627, authorizing rate adjustments in response to failed appropriations, "so that the increased revenues received from the users of such class will equal the amount for that class that the Congress was to appropriate." Thus, it seems beyond serious question that a failure of appropriations within the meaning of §3627 has occurred.[1] In that event, the Postal Service is charged with deciding whether to adjust the rates in question.

In making an adjustment decision, the Service is enjoined by 39 U.S.C. §403 not to "make any undue or unreasonable discrimination among users of the mails, nor shall it grant any undue or unreasonable preferences to any such user." This general command to the Service does not provide a clear answer to the problem at hand. For example, since the Service has granted the nonprofit rate to the major parties, minor parties can complain of discrimination; if the Service had accorded all political committees the same rate, other users of the mails might have complained that the Service was subsidizing the fringe political parties at their expense. Therefore, the Service's rate classification seems to be within the bounds of reason. Moreover, 39 U.S.C. §3621 requires the Service to set rates so that the mail pays its way in light of estimated costs, income, and appropriations. The present rate differential has that effect; it appears to be authorized.

II. The Constitutionality of Postal Rate Differences Among Categories of Political Committees

Constitutional analysis must begin with *Buckley* v. *Valeo*, 424 U.S. 1 (1976), which upheld the constitutionality of the relevant provisions of the Federal Election Campaign Act of 1971. The statute had the present definitions of major and minor parties, along with a catchall category for "new parties," including all parties receiving less than 5 percent of the vote in the last election. 26 U.S.C. § 9002(8). The statute granted minor parties a ratio of the funds available to a major party depending on the ratio of their votes in the last election to those of the major parties. New parties would receive no money before the general election, but any candidate receiving 5 percent of the popular vote could receive post-election payments on the formula for the minor parties.

The Court upheld this part of the statute against an argument that it violated the equal protection principle of the Fifth Amendment. The Court began by reviewing its strict standard of review for direct restrictions on access to the electoral process, such as ballot qualifications.[2] The Court immediately distinguished the public financing provisions before it from the direct burdens on a candidate's ability to run for office in the ballot qualification cases, on the ground that public financing is less restrictive of access to the electoral process.

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[1] *See also Association of American Publishers, Inc.* v. *Governors of U.S. Postal Service*, 485 F.2d 768, 776 (D.C. Cir. 1973).

[2] These restrictions require the presence of a "vital" governmental interest that is "achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity," 424 U.S. at 94.

Accordingly, it stated a somewhat weaker standard of review for such indirect political restrictions as public campaign financing:

> Congress enacted . . . [the statute] in furtherance of sufficiently important governmental interests and has not unfairly or unnecessarily burdened the political opportunity of any party or candidate.

424 U.S. at 95–96.

The Court was unmoved by the objections to the statute that minor parties receive less money than major ones, that new parties can receive only post-election funds, and that parties with less than 5 percent of the vote receive nothing. The Court emphasized that major parties suffer concomitant disadvantages in spending ceilings in return for public financing, and that minor parties remain free to raise money up to the spending limit for the major parties. The Court found sufficiently important governmental interests in eliminating the improper influence of large private contributions and in conserving public money through denial of funds to parties unable to demonstrate a modicum of support. At the same time, the Court thought that the statute did not unduly inhibit the opportunity of minor parties to become major ones if they could obtain enough private support.

The Court found the 5 percent threshold requirement for funding to be rational, citing *Jenness* v. *Fortson*, 403 U.S. 431 (1971), which upheld a requirement that candidates obtain signatures of 5 percent of eligible voters in order to be placed on the ballot. In *Jenness*, the Court had distinguished *Williams* v. *Rhodes*, 393 U.S. 23 (1968), in which the Court invalidated a set of Ohio restrictions on ballot access that made it very difficult for any party other than the Republicans and Democrats to reach the ballot. In discussing *Jenness*, the Court referred to threshold requirements as serving a public interest against providing "artificial inventives to 'splintered parties and unrestrained factionalism.' " Thus a respectable argument can be made that the postal rate differential is constitutional. Mail subsidies, like campaign financing, are expenditures of public money; *Buckley* allows reasonable classifications designed to protect the public fisc.

On the other hand, several factors make it more difficult to justify postal rate differentials than the campaign financing statute. First, there is no retroactivity provision by which a small party, by receiving 5 percent of the popular vote in the forthcoming election, can receive post-election funds. Second, there is no countervailing disadvantage for major parties, such as the campaign spending limits, in return for the postal rate subsidy they receive. Third, as *Buckley* emphasized, the campaign financing statute does not interfere with the capacity of small parties to become large ones through private fundraising, and perhaps even to qualify for federal campaign funds. In contrast, a postal rate differential directly impedes a major technique by which a small party might attempt to increase popular support. Furthermore, postal rate disparity costs new parties relatively more money as the size of their mailings increases—the better they do, the more they are disadvantaged in comparison to the major parties. Thus it seems substantially more difficult to justify postal rate differentials than the campaign financing statute upheld in *Buckley*. It is also significant that, as shown by comparison of two of the ballot restriction cases, *Jenness* and *Williams*, the acceptability of particular restraints is a matter of degree. Large rate differentials are harder to justify than small ones.

One final topic deserves mention. In *Buckley*, the Court was reviewing the structure of a statute; here we are concerned with an appropriations proviso encouraging administrative differentials among parties. Although the Court in *Buckley* was aware that no minor parties would qualify in 1976, so that funds would be available only to Democrats and Republicans in that election, it was reviewing a statutory scheme that was neutral in its long-term application because it would remain available to third parties that might arise over time. That is not our situation. In the case at hand, because the statutory proviso is in an appropriation, it is effective only for this fiscal year, and an election year at that. The fact is inescapable that it fosters a one-time differential that would favor the major parties at the expense of all others.

In conclusion we believe that a respectable argument can be made that *Buckley* v. *Valeo* justifies a postal rate differential. Nevertheless, there is serious constitutional jeopardy in the present rate differential, which significantly burdens small parties in comparison to the major ones.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

Constitutionality of the Disclosure Provisions of the Ethics in Government Act as Applied to Officials' Spouses

Whatever test is applied to test their constitutionally, the provisions of the Ethics in Government Act that require certain high-level officials to disclose information concerning their spouses' financial interests do not invade any constitutionally protected privacy right.

The financial disclosure provisions at issue are narrowly drawn to promote Congress' interest in using disclosure to enforce substantive prohibitions vis-a-vis high-level officials.

January 9, 1980

MEMORANDUM OPINION FOR THE CHAIRMAN OF THE FEDERAL TRADE COMMISSION

You have asked for our advice about the refusal by a former official of the Federal Trade Commission (FTC) to disclose information concerning his wife's financial interests, information he is required to disclose by Title II of the Ethics in Government Act, Pub. L. No. 95-521, 92 Stat. 1836 (1978), as amended, 5 U.S.C. App. I. The official filed the statement required by the Act but omitted this information. He said that he was willing to disclose it confidentially, but he argued that the provisions of the Ethics in Government Act, which effectively compel public disclosure of the information, violated his and his wife's constitutional rights. For the reasons set forth below, we believe that the challenged provisions are constitutional.[1] We suggest that you inform the official of this conclusion and of any conclusion reached by the Office of Government Ethics, to which you also referred the matter, and allow him to decide, in light of this information, whether he wishes to complete his report. In this connection, you may give him a copy of this memorandum.

Title II of the Ethics in Government Act requires high-level Executive Branch officials, *see* § 201(f), to file reports disclosing a number of details about their income, assets, and liabilities, about gifts and reimbursements they have received, about certain sales or exchanges of real property and securities, and about some other financial affairs and arrangements. *See* § 202(a)–(d). With some exceptions and modifications they must disclose comparable information about their spouses and dependent children. *See* § 202(e). These reports are to be made public. *See* § 205. The official involved here contends that the government cannot constitutionally require him to disclose to the public financial information about his wife that is not already a matter of public record. He makes a number of arguments in a legal memorandum he filed with your agency in support of his position.

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[1] Ordinarily, this Office would not seriously consider concluding that an Act of Congress was unconstitutional. *See, e.g.*, 40 Op. Att'y Gen. 158, 160-61 (1942); 39 Op. Att'y Gen. 11, 16 (1937); 31 Op. Att'y Gen. 475, 476 (1919). In this case, however, we are confident that the challenged provisions would be upheld by a court, and we have set forth our reasons for believing these provisions to be constitutional so that the official might know that his arguments have been fully considered.

His most substantial argument is that the Act violates his wife's constitutional right to privacy. The Supreme Court has said that the right of privacy comprises an "individual interest in avoiding disclosure of personal matters." *Whalen* v. *Roe,* 429 U.S. 589, 599 (1977). The Court has never invalidated a statute solely because it infringed this kind of "privacy" interest. *Compare id.* at 599 n.25 *with id.* at 607–09 (Stewart, J., concurring). But on at least two occasions the Court seriously considered claims that government action unconstitutionally invaded this interest; in both cases it rejected the claims only after concluding that the "personal matters" involved would be disclosed not to the public at large but only to a small group of selected officials who were unlikely to publicize it. *See, id.* at 605–06; *Nixon* v. *Administrator of General Services,* 433 U.S. 425, 458–59, 462, 464–65 (1977). Neither of these cases involved financial information,[2] but as two Justices have said, "[f]inancial transactions can reveal much about a person's activities, associations, and beliefs. At some point, governmental intrusion upon these areas would implicate legitimate expectations of privacy." *California Bankers Association* v. *Shultz,* 416 U.S. 21, 78–79 (1974) (Powell and Blackmun, JJ., concurring). *See also Buckley* v. *Valeo,* 424 U.S. 1, 66 (1976). *But see O'Brien* v. *DiGrazia,* 544 F.2d 543, 545–46 (1st Cir. 1976), *cert. denied,* 431 U.S. 914 (1977). The Fifth Circuit has upheld the judicial branch disclosure provisions of the Ethics in Government Act, *Duplantier* v. *United States,* 606 F.2d 654, 669–71 (1979), as well as a state statute similar to the Act, *Plante* v. *Gonzalez,* 575 F.2d 1119 (1978), but nevertheless said that public officials' "interests in financial privacy" were "substantial." *Id.* at 1135. "Financial privacy is a matter of serious concern, deserving strong protection." *Id.* at 1136.[3] *See also Slevin* v. *City of New York,* 477 F. Supp. 1051 (S.D.N.Y. 1979).

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[2] In *Whalen* v. *Roe,* 429 U.S. 589, 599 (1977), patients and doctors challenged New York's practice of keeping centralized computer records of prescriptions for dangerous but legal drugs. *Nixon* v. *Administrator of General Services,* 433 U.S. 425 (1977), involved the personal communications and diaries of former President Nixon; they were commingled with a much larger volume of public papers that government archivists were to screen.

[3] The official also suggests that the Act interferes with his wife's First Amendment freedoms because her financial interests may reveal her political beliefs and associations. The Supreme Court has, indeed, frequently held that forcing the disclosure of information about certain First Amendment activities can deter people from engaging in them. *See, e.g., Gibson* v. *Florida Legislative Comm.,* 372 U.S. 539 (1963); *NAACP* v. *Button,* 371 U.S. 415 (1963); *Shelton* v. *Tucker,* 364 U.S. 479 (1960); *Bates*

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For these reasons, some state courts have held that statutes requiring financial disclosure are unconstitutional unless they are necessary to promote a compelling governmental interest. *See, e.g., City of Carmel-by-the-Sea* v. *Young,* 2 Cal.3d 259, 268, 466 P.2d 225, 231–32, 85 Cal. Rptr. 1, 7–8 (1970). No Federal court has gone this far. *See Nixon* v. *Administrator of General Services,* 433 U.S. at 455–65; *Duplantier* v. *United States, supra,* 606 F.2d at 670 (appropriate test is "balancing" not "strict scrutiny"); *Plante* v. *Gonzalez,* 575 F.2d 1119, 1134 (5th Cir. 1978) (same). *Compare Whalen* v. *Roe,* 429 U.S. 589, 606–07 (1977) (Brennan, J., concurring) *with id.* at 607–09 (Stewart, J., concurring). We need not express a view about the strength or contours of whatever constitutional rights exist in this area, however, because we believe that the Ethics in Government Act does meet the strictest plausible test; it is a necessary means, well-tailored to attain compelling governmental aims. *A fortiori* it would meet any less restrictive standard.

Congress was explicit about its objectives in requiring officials to disclose financial information to the public. Public disclosure promotes public confidence in the government, *see* S. Rep. No. 170, 95th Cong., 1st Sess. 21 (1977); no intragovernmental audit can be quite as successful in dispelling suspicion. Public disclosure can help correct deficiencies in the government's own auditing and reviewing procedures. *See* S. Rep. No. 823, 94th Cong., 2d Sess. 22 (1976). "Wide public availability of the financial disclosure reports" tends to "assure compliance with [the] disclosure requirements" themselves. H.R. Rep. No. 574, 95th Cong., 1st Sess. 11 (1977). In general, public financial disclosure makes officials' possible conflicts of interest a subject for debate and action by the public. As a result,

> [p]ublic financial disclosure will deter some persons who should not be entering public service from doing so. Individuals whose personal finances would not bear up to

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v. *Little Rock,* 361 U.S. 516 (1960); *NAACP* v. *Alabama,* 357 U.S. 449 (1958). And it has recognized that, on occasion, financial information can reveal significant facts about activities protected by the First Amendment. *See Buckley* v. *Valeo,* 424 U.S. 1, 66 (1976), *quoting California Bankers Association* v. *Shultz,* 416 U.S. 21, 78–79 (1974) (Powell and Blackmun, JJ., concurring). But for several reasons the argument is inapposite here. First, the Act was drafted to avoid such an invasion of First Amendment rights so far as possible. Section 202(a)(6)(A), for example, requires an official to report positions held in outside organizations; but it does not apply to members of the official's family, and it specifically provides that the official need not report "positions held in any religious, social, fraternal, or political entity and positions solely of an honorary nature." This suggests that Congress carefully considered First Amendment interests when it drafted the Act. *Cf., American Fed'n of Gov't Employees, Local 421* v. *Schlesinger,* 443 F. Supp. 431, 434 (D.D.C. 1978) (financial disclosure questionnaire for government officials unconstitutional because it "prys into religious, social, political, educational, and fraternal associations both of the employee, the employee's spouse, his minor children and dependents"). Second, even when a statute requires an individual to disclose material that directly reflects his political views, the Supreme Court has required him to show "a reasonable probability that the compelled disclosure . . . will subject [him] to threats, harassment, or reprisals." *Buckley* v. *Valeo,* 424 U.S. 1, 74 (1976). The official here has made no such showing. Finally, even if there were a danger that the disclosure provisions would interfere with First Amendment rights, they are—as we shall discuss shortly—necessary to promote "governmental interests sufficiently important to outweigh the possibility of infringement." *Id.* at 66.

> public scrutiny, whether due to questionable sources of income or a lack of morality in business practices, will very likely be discouraged from entering public office altogether. . . .
>
> Public financial disclosure will [also] better enable the public to judge the performance of public officials. By having access to financial disclosure statements, an interested citizen can evaluate the official's performance of his public duties in light of the official's outside financial interests.

S. Rep. No. 170, 95th Cong., 1st Sess. 21–22 (1977). *See also* H.R. Rep. No. 574, 95th Cong., 1st Sess. 7–12. "[I]nformed public opinion is the most potent of all restraints upon misgovernment." *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936).

The Supreme Court has said that because these sorts of goals involve the " 'free functioning of our national institutions,' " they can justify a decision by Congress to impose "not insignificant burdens on individual rights." *Buckley* v. *Valeo*, 424 U.S. 1, 66–67, 68, 72–74 (1976), *quoting Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, 97 (1961). And the Supreme Court has allowed Congress to require disclosure in order "to maintain the integrity of a basic governmental process" even if the disclosure may have "some deterrent effect" on the exercise of constitutional rights. *United States* v. *Harriss*, 347 U.S. 612, 625–26 (1954). Certain public employees can be required to sacrifice important rights—even well-established First Amendment rights that can only be stronger than the rather nebulous privacy interests involved here—in order to ensure that "confidence in the system of representative Government is not . . . eroded to a disastrous extent," *United States Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548, 565 (1973), and that "policies which the electorate has sanctioned are effectively implemented," *Elrod* v. *Burns*, 427 U.S. 347, 372 (1976) (plurality opinion).

Disclosure does not merely enhance public confidence in the government; it also improves the quality of public debate about such matters of general concern as possible conflicts in officials' loyalties. It expresses our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times* v. *Sullivan*, 376 U.S. 254, 270 (1964). To promote these ends, the Supreme Court has said that officials "who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs," *Rosenblatt* v. *Baer*, 383 U.S. 75, 85 (1966), cannot constitutionally be protected against certain efforts to damage their reputations, even if the legislature wants to protect them. *See, e.g.*, *New York Times* v. *Sullivan*, 376 U.S. 254 (1964). The interest in reputation, of course, is akin to the sort of privacy the official here claims is invaded by the Ethics in Government Act. In these various ways, then, requiring officials to disclose financial information plainly promotes compelling governmental ends.

Congress reasoned that its efforts to pursue these ends could be easily defeated if it did not also require officials' spouses to disclose certain information.[4] "[R]esources of a husband and a wife are usually held in common, and the financial interests of a spouse are generally shared by the partner. A bookkeeping arrangement wherein one spouse holds sole title to a particular financial asset does not mean that the partner does not share an interest in the financial holding." H.R. Rep. No. 574, 95th Cong., 1st Sess. 23 (1977). Congress also noted that, unless officials are required to disclose financial information about their spouses, they can easily evade both substantive and disclosure requirements by transferring interests. *See id.* at 22. Even officials who do not gain directly from their spouses' interests may simply wish to see their spouses gain. *Id.* at 22, 40. Those who want to influence an official may attempt to do so by benefitting the official's spouse. Moreover, even if these various evasions never occur, the danger that they will occur—and the public knowledge that an obvious loophole exists that might permit them to occur—would undermine a principal objective of the Ethics in Government Act, restoring public confidence in the integrity of the government.

Finally, requiring officials to disclose their spouses' financial interests is an important means of enforcing substantive conflict of interest laws. For example, in general an Executive Branch employee may not participate

> . . . personally and substantially as a Government officer or employee . . . in a judicial or other proceeding . . . or other particular matter in which, to his knowledge, he, his spouse, [or] minor child . . . has a financial interest.

18 U.S.C. § 208(a). Plainly, the public availability of financial information about an official's spouse helps enforce this conflict of interest provision, and the Supreme Court has recognized that Congress has a strong interest in using disclosure—not merely recordkeeping and reporting—to enforce substantive prohibitions. *See, e.g., Buckley* v. *Valeo,*

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[4] In fact, the spouse need not disclose anything, the official must disclose information about his or her spouse. The House Committee

> considered, and rejected as irrelevant, arguments that the government may have difficulty in bringing a civil or criminal action against an individual who . . . filed an incomplete statement, because the spouse may have refused to provide the necessary information. This concern is more appropriately raised as a defense when the reporting person, despite a good-faith effort, is unable to comply with the reporting provisions of the law. The committee believes that such good-faith tests may be useful in reviewing specific cases of noncompliance, but that such situations should not be viewed as impediments to the passage of this bill.

H.R. Rep. No. 574, 95th Cong., 1st Sess. 24 (1977).

424 U.S. 1, 67–68 (1976). *See also Duplantier* v. *United States, supra,* 606 F.2d at 670–73.

Both the Act itself and its legislative history reveal that the disclosure provisions were narrowly drawn to promote these compelling ends. In connection with the disclosure provisions for all three branches, Congress considered the specific advantages of requiring public disclosure instead of permitting reports to be filed confidentially with government reviewing bodies. *See, e.g.,* H.R. Rep. No. 574, 95th Cong., 1st Sess. 7–12 (1977); H.R. Rep. No. 642, 95th Cong., 1st Sess. 27–29 (1977). Congress also "recognize[d] that reporting of financial interests of family members is a very sensitive matter." H.R. Rep. No. 642, *supra,* at 40; *see* H.R. Rep. No. 574, *supra,* at 8–12. Instead of requiring officials to disclose all financial information about their spouses, the Act creates exceptions consistent with its objective of removing both the opportunity and the appearance of an opportunity for evasion. A spouse need only report the source, not the amount, of his or her earned income. § 202(e)(1)(A). Gifts and reimbursements "received totally independent of the spouse's relationship to the reporting individual," § 202(e)(1)(B), (C), need not be reported. A spouse's liabilities, interests in property, and sales or exchanges of property need not be reported if four conditions are met: the official certifies that they "represent the spouse's . . . sole financial interest or responsibility"; the official "has no knowledge of" them; they "are not in any way, past or present, derived from the income, assets, or activities of the reporting official" and the official "neither derives, nor expects to derive, any financial or economic benefit" from them. § 202(e)(1)(D).[5] In addition,

> No report shall be required with respect to a spouse living separate and apart from the reporting individual with the intention of terminating the marriage or providing for permanent separation; or with respect to any income or obligations of an individual arising from the dissolution of his marriage or the permanent separation from his spouse.

§ 202(e)(2).[6] Clearly, then, Congress was not simply appeasing the public's general curiosity about the private financial affairs of high

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[5] The official claims that these provisions—specifically, the terms "no knowledge" and "expects to derive . . . financial or economic benefit"—are unconstitutionally vague. On its face this claim is implausible; these terms are used frequently both in the law and in ordinary language and are seldom thought to be unusually unclear. In addition, the official here does not argue that their alleged vagueness affects him; that is, he does not say that he finds it difficult to decide whether these provisions require him to disclose certain of his wife's separate interests. Under these circumstances we see no reason to deny the enforcing agencies the opportunity to gloss any unclear provisions and make their meaning more plain. Moreover, only knowing or willful violations of the disclosure provisions can be punished. § 204. Because a violation caused by genuine uncertainty about the meaning of the provision would very likely be held not to be willful, these provisions may not present a constitutional problem even if their meaning is unclear.

[6] The disclosure provisions apply only to cohabiting spouses, not to other people who are living together and whose finances might be equally intertwined. The official argues that this unconstitutionally deters marriage and discriminates against married couples in favor of unmarried couples. Any

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officials' families; it was seriously grappling with the dangers of various possible conflicts of interest.

Congress also attempted to limit the damage that might be caused by any invasion of an official's privacy. The financial disclosure reports filed by officials must be destroyed after 6 years. § 205(d). Under pain of a civil penalty, *see* § 205(c)(2), members of the public to whom the reports have been disclosed may not used them for commercial purposes, to establish credit ratings, or "directly or indirectly, in the solicitation of money for any political, charitable, or other purpose." § 205(c)(1)(D). Congress recently amended the Act to make these provisions easier to enforce. *See* § 205(b)(2); H.R. Rep. No. 114, 96th Cong., 1st Sess., 5–6 (1979).

Finally, the Executive Branch disclosure provisions apply only to high-level officials. *See* § 201(f). In the case law dealing with statutes like the Ethics in Government Act, this has been a crucial concern. In general, courts have been hostile to state financial disclosure legislation only when it applied to all officials or to officials with no significant responsibility for making policy. *Compare Slevin* v. *City of New York,* 477 F. Supp. 1051 (S.D.N.Y. 1979), *City of Carmel-by-the-Sea* v. *Young,* 2 Cal. 3d 259, 466 P.2d 225, 85 Cal. Rptr. 1 (1970), *and Advisory Opinion on Constitutionality of 1975 PA 227 (Questions 2–10),* 396 Mich. 465, 502–09, 242 N.W.2d 3, 18–21 (1976), *with id.* at 508, 242 N.W.2d 3, 20 (noting that statute that was unconstitutional as applied to all officials could constitutionally be applied to high officials alone). The Fifth Circuit, in addition to upholding the judicial branch disclosure provisions of the Ethics in Government Act, *Duplantier* v. *United States, supra,* has upheld a state statute that applied to high-level officials, *Plante* v. *Gonzalez,* 575 F.2d 1119 (1978). Several states have sustained similar statutes. *See id.* at 1124 n.8 (collecting cases). The Supreme Court has dismissed, for want of a substantial federal question, appeals from at least two decisions upholding state statutes that required information from high-level state officials about both their own and their spouses' financial interests. *Walsh* v. *Montgomery County,* 424 U.S. 901 (1976), dismissing appeal from 274 Md. 489, 336 A.2d 97 (1975); *Fritz* v. *Gorton,* 471 U.S. 902, dismissing appeal from 83 Wash.2d 275, 517 P.2d 911 (1974). *See also Stein* v. *Howlett,* 412 U.S. 925 (1973), dismissing appeal from 52 Ill.2d 570, 289 N.E.2d 409 (1972). This disposition by

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incidental effect this provision might have on a couple's decision to marry does not present a constitutional problem. *Compare Zablocki* v. *Redhail,* 434 U.S. 374, 387 n.12 (1978), *with Califano* v. *Jobst,* 434 U.S. 47, 54 (1977). Congress generalized that cohabiting married couples are more likely to have the sort of financial relationship that makes disclosure by both necessary to achieve the objectives of the Act; in view of the significance of marriage to family and property law, and particularly the greater ease with which married people can share or transfer property interests, this is a reasonable generalization. Indeed it is difficult to imagine a clear distinction that would be more accurate than the one Congress has drawn. Defining the precise sort of relationship between cohabiting, unmarried people that would require them both to disclose if one were an official might be a cumbersome task and might itself create constitutional problems.

the Supreme Court is ordinarily considered a decision on the merits. Thus precedent strongly suggests that a statute as well-tailored as Title II of the Ethics in Government Act is constitutional.

For these reasons, we believe that the government can constitutionally require the official in question to disclose the financial information about his spouse specified by the Ethics in Government Act.

Leon Ulman
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Office of Legal Counsel

Department of Justice Authority to Provide "Protective Custody" for Defectors

While any component of the Department of Justice may contract with the Department of state to perform the latter's security functions, the Department of State is not authorized to provide protective custody to defectors who are neither leading figures in, nor direct representatives of, their government.

The Attorney General has authority under the Immigration and Nationality Act to prevent departure of an alien defector who is being repatriated under duress and might, in a particular case, have discretionary authority to provide some sort of protective custody for that defector.

Under § 235(b) of the Immigration and Nationality Act, the Immigration and Naturalization Service has authority to detain a defector who is deportable or excludable, until such time as he is granted political asylum.

If a defector is assaulted, harassed, specifically threatened, or abducted, so as to bring into play one of several potentially applicable federal criminal statutes, federal law enforcement agencies may be authorized to play a role in his protection.

The Secretary of State may designate any defector an official guest in order to make it a federal offense to assault, harass, intimidate, coerce, imprison, threaten, kidnap, or kill the defector.

January 17, 1980

MEMORANDUM OPINION FOR THE ACTING ASSOCIATE ATTORNEY GENERAL

This responds to your inquiry regarding the authority of Department of Justice agencies to protect aliens who have defected to the United States. You ask us to assume:

(1) That the defector is not an obvious source of intelligence information;
(2) That the defector is within the United States and at or near an office of the Federal Bureau of Investigations (FBI) or the Immigration and Naturalization Service (INS);
(3) That the defector is seeking political asylum in the United States;
(4) That neither the Department of State nor any other government agency has "firm information" that the defector is threatened with either forced repatriation or bodily harm; and

(5) That "the circumstances of the defection are such that a reasonable person might wish to take security precautions."

You ask whether, in such a case, any component of the Department of Justice would have authority to fulfill a request made by the Department of State to provide "protective custody" for the defector.

You do not define "protective custody." We shall assume that it does not involve taking any action against the defector's will, and that the defector consents to any arrangement made for his protection. We shall also assume that it involves at least protecting the defector against the possibility of physical attack. For the reasons stated below, we believe that no component of the Department of Justice has authority even to protect defectors against the possibility of physical attack in *all* cases of the sort you describe, although certain agencies may have authority to provide protection against the danger of physical attack, and perhaps a form of protective custody as well, in some cases.

1. U.S. Marshals Service Acting Under Agreement With the Department of State

Under 31 U.S.C. § 686(a), "[a]ny executive department . . . or any bureau or office thereof . . . may place orders with any other such department, establishment, bureau, or office, for . . . work, or services, of any kind that such requisitioned Federal agency may be in a position to supply or equipped to render . . . ." This provision would authorize any component of the Department of Justice to contract with the Department of State to perform the latter's security functions. Since the Marshals Service administers the federal witness protection program, 18 U.S.C. prec. § 3481, 28 C.F.R. § 0.111(c), it is the agency most clearly "in a position to" protect defectors. Thus, if the Department of State can itself provide protective custody for defectors, the Marshals Service can also do so under an agreement with it.[1]

In most cases of the sort you describe, however, the Department of State lacks the authority even to protect defectors against the possibility of a physical attack. Under 22 U.S.C. § 2666, qualified Department of State security officers "are authorized to carry firearms for the purpose of protecting heads of foreign states, official representatives of foreign governments, and other distinguished visitors to the United States . . . and members of the immediate families of any such persons,"[2] No other statute gives the Department of State explicit authority to protect anyone. It might be suggested that visiting athletes and artists, for example, are "distinguished foreign visitors" and perhaps "official representatives" of their governments; if they defect, § 2666 might authorize their protection. Two arguments militate against this interpretation, however.

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[1] The Marshals Service currently has an agreement with the Department of State to "provide manpower and equipment as determined by the Marshals Service, in order to augment the State Department's capacity to carry out its protective functions in the most secure manner," "subject to manpower availability and normal mission requirements." This agreement provides that the Department of State is to reimburse the Marshals Service for its work. Whether the requisitioning agency must reimburse the agency providing the service depends on the terms of the agencies' respective authorization and appropriations statutes. *See* 13 Comp. Gen. 234 (1934); 34 Comp. Gen. 42 (1954).

First, the original version of § 2666, in effect until 1975, authorized security officers of the Department of State to protect "heads of foreign states, high officials of foreign governments and other distinguished visitors to the United States . . . and official representatives of foreign governments and of the United States attending international conferences, or performing special missions." Pub. L. No. 84-104, 69 Stat. 188 (1955). There is no indication in the legislative history that the 1975 rewording was intended to alter the scope of the statute. *See* S. Rep. No. 337, 94th Cong., 1st Sess. 22 (1975). Because the term "distinguished visitors" was linked with "high officials of foreign governments" in the original version of § 2666 and even more clearly in its legislative history, *see, e.g.*, H.R. Rep. No. 468, 84th Cong., 1st Sess. 1 (1955), "distinguished visitors" must, we believe, be limited to leading political, diplomatic, and military figures. We doubt it can be extended to include all prominent foreign visitors who might happen to defect while in the United States. The original version of § 2666 also suggests that the "official representatives" protected are those "attending international conferences, or performing special missions." Again, Congress seemed to have in mind official conferences concerned with political, military, or diplomatic matters; one of the justifications for the bill was the need "to guarantee the safety from compromise of the vast amount of highly classified material needed at an international conference." S. Rep. No. 552, 84th Cong., 1st Sess. 2 (1955). Congress may have intended to expand this category somewhat by omitting the reference to international conferences and special missions, but there is no reason to believe that "official representatives" includes persons other than those acting directly on behalf of their respective governments.

The second argument reinforces this conclusion. In 1972 Congress amended several statutes to make it a federal crime to assault, threaten, harass, kidnap, or kill "official guests." Pub. L. No. 92-539, §§ 101-301, 86 Stat. 1070 (1972), *amending* 18 U.S.C. §§ 112, 1116, 1201. Congress created this category of "official guests" because it wanted federal criminal laws to "operate to protect the rights of visiting artists, academic and scientific groups, and other groups and individuals who ought not be beyond the pale of Federal concern." S. Rep. No. 1105, 92d Cong., 2d Sess. 9 (1972). Congress thought that such visitors would otherwise receive no federal protection against such offenses, *see, e.g., id.* at 7; yet at the time, the predecessor of § 2666 had been in effect for 17 years. When Congress amended § 2666 in 1975, it did not include "official guests" in the new version of the statute; it retained the term "official representatives." This again suggests that Congress did not wish to authorize Department of State security officers to protect even such prominent foreign visitors as athletes, artists, and academics.[3]

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[2] Under 22 U.S.C. § 2666, Department of State security officers are also authorized to protect "the Secretary of State, the Deputy Secretary of State, official representatives of the United States Government, and members of the immediate families of any such persons."

For these reasons, we seriously doubt that the Department of State has authority to request the Marshals Service to protect defectors who are neither leading figures in, nor direct representatives of, their governments. Moreover, it is unlikely that an "official representative" would retain his status if the country he purported to represent attempted to strip him of it. The Marshals Service would, of course, be able to protect "distinguished foreign visitors" who defect[4]—presumably a small proportion of the cases we are considering here.

2. FBI Authority

Under 28 U.S.C. § 553 (1), (3), the FBI is empowered "to detect and prosecute crimes against the United States" and "to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." Whatever authority these provisions may give to protect potential victims of federal crimes against whom a specific threat has been made, we believe that they do not authorize the FBI to protect defectors in the circumstances we are considering here. *Compare* 28 U.S.C. § 553 *with* 18 U.S.C. § 3481 note (specifically authorizing the Attorney General to "provide for the security of" government witnesses who testify against alleged participants in organized crime.)[5]

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[3] 22 U.S.C. § 2667 empowers Department of State security officers "engaged in the performance of the duties prescribed in section 2666" to "arrest without warrant and deliver into custody any person violating section . . . 112 of title 18 in their presence or if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a violation." *See also* 22 C.F.R. § 2.1. Under 18 U.S.C. § 112, it is a crime to assault, harass, intimidate, coerce, threaten, or similarly harm foreign officials, internationally protected persons, or official guests. For reasons we give in section 5, *infra*, we believe that § 2667 may enable Department of State security officers to provide some aid to defectors who have been specifically threatened or harmed. But for two reasons, § 2667 cannot be read to authorize Department of State security officers to protect "official guests," or others within the scope of § 112, if they have not been specifically threatened. First, security officers whose mission was to provide such protection would be "engaged in the performance of . . . duties" *not* enumerated in § 2666. Second, we doubt that the authority to enforce a statute by arresting violators implies the authority to protect persons when no specific threat has been made, especially when another statute expressly authorizes the protection of a smaller class of persons.

[4] Indeed, the Marshals Service may already have this power under the existing agreement, *see* note 1 *supra.*

[5] The Director of Central Intelligence, the Attorney General, and the Commissioner of Immigration and Naturalization can authorize certain aliens to enter the United States, notwithstanding other immigration laws, if their entry "is in the interest of national security or essential to the furtherance of the national intelligence mission." 50 U.S.C. § 403h. Pursuant to this authority, the National Security Council and the Director of Central Intelligence have established a program for dealing with defectors who are valuable to intelligence agencies. The FBI plays a role in this program, but the program plainly omits authority for the FBI or any other agency to house or otherwise maintain defectors of the sort you describe. This, too, suggests the FBI has no role in providing protective custody in the circumstances we are considering here.

3. The Attorney General's Authority To Enforce § 215 of the Immigration and Nationality Act

Under 8 U.S.C. § 1103(a), the Attorney General is "charged with the administration and enforcement of [the Immigration and Nationality Act] and all other laws relating to the immigration and naturalization of aliens." Ordinarily, he carries out this responsibility through the Immigration and Naturalization Service. Section 215(a)(1) of the Act provides:

> Unless otherwise ordered by the President, it shall be unlawful . . . for any alien to depart from . . . the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe.

8 U.S.C. § 1185(a)(1). It appears to us that current regulations would not, in general, authorize the Attorney General to prevent the departure of a defector in the circumstances you describe.[6] But we believe that § 215(a)(1) would authorize regulations prohibiting the departure of, for example, an alien defector who was being repatriated either under duress or in circumstances that cast doubt on the ability of the United States to protect defectors.[7] If a regulation were issued that

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[6] The regulations, 22 C.F.R. § 46.2, provide that "[n]o alien shall depart, or attempt to depart, from the United States if his departure would be prejudicial to the interests of the United States under the provisions of [22 C.F.R.] § 46.3." Section 46.3 then specifies the categories of aliens whose departure "shall be deemed prejudicial to the interest of the United States." None of these categories will apply to all defectors of the kind you describe, and few of the categories are likely to apply to any. Section 46.3(g), for example, prohibits the departure of "[a]ny alien who is needed in the United States as a witness in . . . any criminal case under investigation or pending in a court in the United States." An investigation of a possible violation of some state or federal criminal statute, *see* section 5 *infra*, might be warranted in some cases of the kind you describe and the defector might be needed as a witness at that investigation. But if, as you specified, there is no "firm information" that the defector is likely to be abducted or physically harmed, a criminal investigation will generally not be warranted. Section 46.3(h) prohibits the departure of "[a]ny alien who is needed in the United States in connection with any investigation or proceeding being, or soon to be, conducted by any official executive, legislative, or judicial agency in the United States or by any governmental committee, board, bureau, commission, or body in the United States, whether national, state, or local." 22 C.F.R. § 46.3(h). This provision might appear to allow a defector to be kept in the United States, if, for example, a government body planned to ask him formally about his reception by American officials or about relatives or assets remaining in the nation from which from he defected and possible diplomatic action concerning them. But we doubt that this provision would be construed to reach cases in which the formal inquiry is a pretext and the true "prejudice to the interests of the United States" stems not from the alien's failure to appear at the inquiry but from the manner or circumstances in which he departed. Invoking 22 C.F.R. § 46.3(k) would present the same problem. It effectively prohibits the departure of an alien whose case "involves circumstances of a [character] similar" to the other categories under § 46.3. While not all of these categories involve, for example, national security or national defense, *see, e.g.*, 22 C.F.R. § 46.3 (f), (g), (h), they all do involve, at the least, aliens whose personal characteristics—their knowledge, intentions, or legal liabilities—make their departure prejudicial to the United States. None involves an alien who does not wish to depart; none involves an alien whose personal characteristics are unimportant but who would depart in a manner or under circumstances which reflect unfavorably on the United States. For these reasons, we believe that new regulations should be issued if the Attorney General is to exercise his power under § 215(a)(1) to prevent the departure of defectors in the circumstances you mention.

[7] By its terms, § 215(a) grants the President full power to regulate the departure of aliens, requiring only that the regulations be reasonable. The legislative history of § 215(a) shows that Congress

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effectively prohibited the departure of a defector in the circumstances you describe, we believe the § 215(a)(1) might, in a particular case, authorize the Attorney General to provide some form of protective custody for that defector.

Nothing in § 215(a)(1) suggests that the Attorney General must mechanically refrain from acting until a defector whose departure he is authorized to prevent is boarding an airplane. Implicit in the Attorney General's duty to enforce the Immigration and Nationality Act is the authority to use all reasonable and necessary means to see that it is enforced. *See, e.g., United States* v. *Krapf,* 285 F.2d 647, 650 (3rd Cir. 1961); *United States* v. *Jones,* 204 F.2d 745, 754 (7th Cir. 1953); *United States* v. *Kelly,* 55 F.2d 67 (2d Cir. 1932). In addition, law enforcement authorities customarily have great discretion to decide how to enforce the law. Thus, the Attorney General may determine in a particular case that in order to prevent a defector from departing he must, for example, keep the defector under surveillance so that he can act quickly to prevent a departure or abduction. For similar reasons, the Attorney General would, we believe, be entitled to screen a defector's contacts with other people or to guard the defector in order to prevent attempts to coerce the defector to leave.[8] These steps would appear to be the kind of protective custody you have in mind. They would, we believe, be authorized if they were part of a good faith effort to enforce § 215(a)(1) in light of its underlying policies.

Indeed, the structure of § 215 suggests that the Attorney General has unusually broad discretion to decide which measures are necessary to prevent violations of that section. Section 215(a)(1) declares that it is "unlawful" for certain aliens to leave the United States but prescribes no penalties for violations. Those penalties, which applied both to aliens who illegally entered or departed the United States and to American citizens who attempted to enter or depart without passports, *see* Immigration and Nationality Act, Pub. L. No. 82–414, ch. 477, § 215(a)(1), 66 Stat. 190 (1952) (prior to 1978 amendment), were repealed by Congress in 1978. Pub. L. No. 95–426, § 707(d), 92 Stat. 993. The legislative history of the repeal suggests that while Congress did not wish to "obstruct" or penalize the travel of American citizens, it intended to leave intact the President's authority to regulate the entry or departure

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intended the President to have "broad and comprehensive power," "wide discretion and wide authority of action." H.R. Rep. No. 485, 65th Cong., 2d Sess. 2–3 (1918) (accompanying Act of May 22, 1918, Pub. L. No. 65–154, ch. 81, § 1(a), 40 Stat. 559, which § 215(a) essentially reenacted. *See* H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952)). There is no reason to believe that Congress did not intend the President to use this power to pursue the important humanitarian and foreign policy aims that would be served by preventing the departure of aliens who do not wish to leave. Indeed, Congress envisioned the President using his authority as a "counterstroke" against the "propaganda" efforts of "hostile nations." H.R. Rep. No. 485, 65th Cong., 2d Sess. 3 (1918).

[8] In this connection we emphasize our assumption that the defector consents to the steps the Attorney General is taking to protect him. It is not at all clear that the Attorney General can legally isolate a defector in this way without his consent. Also, we assume that the Attorney General will comply with any international obligations the United States has to permit contacts with defectors.

of aliens under § 215(a)(1). *See* 124 Cong. Rec. 15770 (May 31, 1978) (remarks of Rep. Eilberg). Moreover, nothing in the language of § 215(a)(1) suggests that it is intended to be merely admonitory. *Compare* 8 U.S.C. § 1185(a) *with* 36 U.S.C. § 175 (flag code); *see Holmes* v. *Wallace,* 407 F. Supp. 493, 494–97 (M.D. Ala. 1976). The primary purpose of § 215(a)(1), then, must be to authorize *preventive* action, either administrative or judicial, against aliens who are about to depart illegally. Several other sections of the Immigration and Nationality Act give great discretion to the administrators charged with their enforcement, thus suggesting that Congress envisioned administrative not judicial action to enforce § 215(a)(1); in addition, as we have said, the Attorney General is specifically charged with enforcing the Act, 8 U.S.C. § 1103(a). Since prevention is the only means of enforcing § 215(a)(1), and the Attorney General is primarily responsible for enforcing it, one may reasonably infer that the Attorney General can act more vigorously to prevent violations of § 215(a)(1) than he might act in preventing violations of statutes with more diverse enforcement mechanisms. This further supports the conclusion that in some cases § 215(a)(1), by implication, authorizes the Attorney General to provide defectors whose departure he can prevent with a form of protective custody.

Since Congress has not explicitly authorized such protective custody of defectors, however, *compare* 8 U.S.C. § 1185(a)(1) *with* 18 U.S.C. prec. § 3481, we would advise that the Department take steps to inform the appropriations committees of the Senate and House that we regard § 215(a)(1) as authority to do so in isolated instances and on a temporary basis in connection with the enforcement of § 215(a)(1).

4. Delaying the Grant of Political Asylum

Until an alien is granted political asylum, the Immigration and Naturalization Service has authority to detain him if he fits either of two categories. We believe it is reasonable to assume that a defector who is detained can be adequately protected. Under § 235(b) of the Immigration and Nationality Act, 8 U.S.C. § 1225(b):

> Every alien [with exceptions not relevant here] who may not appear . . . at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for further inquiry to be conducted by a special inquiry officer.

See generally 8 C.F.R. § 235.3(b). If an alien has legally entered the country, § 235(b) cannot authorize his detention. But while attempting to defect, an alien may render himself technically deportable—perhaps by violating a condition of his visa—or may be about to render himself deportable. Section 242(a), 8 U.S.C. § 1252(a), would then apply:

> Pending a determination of deportability in the case of any alien . . . such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody, or (2) be released under bond . . . or (3) be released on conditional parole. But such bond or parole . . . may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability.[9]

The Supreme Court has rejected the view that § 242(a) authorizes the Attorney General to detain an alien only if the alien's detention is necessary to secure his appearance at a deportation hearing. *See Carlson* v. *Landon,* 342 U.S. 524, 534, 541 n.35 (1952). The Court has suggested that an alien may be detained pending deportation proceedings whenever the Attorney General has a "reasonable apprehension" that releasing the alien will injure the national interest, *see id.* at 538, 542, and has not required that the "reasonable apprehension" be supported with specific threats or facts; broad generalizations suffice. *See id.* at 541, 544. Moreover, as the Court has acknowledged, the legislative history of § 242(a) makes plain Congress' intention to vest the Attorney General with considerable discretion in deciding which aliens to detain. *See id.* at 540–41.[10] Since the Attorney General can reasonably conclude that the national interest would be injured if a defector were severely harassed or forcibly repatriated, we believe that in the cases we are considering here § 242(a) would authorize the detention of a deportable defector who consented[11] to be detained.

Since most aliens who have been granted political asylum will not be deportable or excludable, it appears that the Immigration and Naturalization Service has authority to detain a defector only until he is granted asylum. A defector who is entering the country is likely to submit his application for asylum to an immigration judge, "who shall consider that application in connection with an exclusion hearing. . . ." 44 Fed. Reg. 21253, 21258 (1979). A defector who is already in the United States will probably submit his application to the district director. *Id.* In that case, regulations provide that:

> The applicant shall appear in person before an immigration officer prior to adjudication of the application. . . .

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[9] Current regulations require that deportation proceedings be formally initiated before an alien is detained under § 242(a). 8 C.F.R. § 242.2(a).

[10] The General Counsel's office of the Immigration and Naturalization Service informs us that administrative interpretations of § 242(a) essentially follow the Supreme Court's.

[11] *See* note 12 *infra.*

> The district director shall request the views of the Department of State before making his decision unless in his opinion the application is clearly meritorious or clearly lacking in substance. The district director may approve or deny the application in the exercise of discretion.

8 C.F.R. § 108.2. An exclusion hearing is potentially an elaborate affair, *see* 8 C.F.R. § 236.2, and creates opportunity for delay. The district director, and the Department of State where it plays a role, might in the normal course also contribute to delay. Nothing in the Immigration and Nationality Act prohibits an immigration judge or district director, in managing his docket, from giving priority to other cases over one which both parties are willing to delay. If the defector consents,[12] then, and if he is otherwise lawfully in custody, the Immigration and Naturalization Service might delay action on his application for asylum and keep him in custody until any danger to him subsides and until, in due course, his request for asylum is granted. This approach appears to authorize protective custody for some of the defectors your memorandum describes.

5. The Federal Law Enforcement Role if a Defector Is Assaulted or Threatened

The Department of Justice has authority to protect defectors of the kind you describe only in the circumstances we have discussed. You should be aware, however, that once a defector is assaulted, harassed, specifically threatened, or abducted, federal law enforcement agencies may be authorized to play a role. Specifically, we believe, for reasons stated below, that the Secretary of State may designate a defector an "official guest" and in that way give federal law enforcement agencies clear jurisdiction over any assaults, harassment, threats, and similar offenses against the defector, without regard to the interstate character of the offense or to any of the other usual bases for federal law enforcement jurisdiction. This conclusion may be important to you in dealing with defections in the future.

As we noted earlier, several federal statutes make it a crime to injure

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[12] If a defector does not consent, he will be able to invoke portion of § 242(a) itself to gain relief:

> Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

8 U.S.C. § 1252(a). He may also be able to raise serious constitutional questions about his continued detention. *See Stack* v. *Boyle*, 342 U.S. 1 (1952); *compare Carlson* v. *Landon*, 342 U.S. 524 (1951), *with Barenblatt* v. *United States*, 360 U.S. 109, 128 (1959).

"official guests" of the United States in these ways. For example, 18 U.S.C. § 112 provides:

> (a) Whoever assaults, strikes, wounds, imprisons, or offers violence to a foreign official, official guest, or internationally protected person or makes any other violent attack upon the person or liberty of such person, or . . . makes a violent attack upon his official premises, private accommodation, or means of transport or attempts to commit any of the foregoing shall be fined not more than $5,000 or imprisoned not more than three years, or both.
>
> (b) Whoever willfully—
>
> (1) intimidates, coerces, threatens, or harasses a foreign official or an official guest or . . .
>
> (2) attempts to intimidate, coerce, threaten, or harass a foreign official or an official guest . . .
>
> * * * * *
>
> shall be fined not more than $500 or imprisoned not more than six months, or both.

Other statutes make it a federal offense unlawfully to kill or attempt to kill an official guest, *id.* § 1116(a), to kidnap an official guest, *id.* § 1201(a)(4), or to threaten to assault, kidnap, or kill an official guest, whether or not in connection with an extortionate demand, *id.* § 878 (a), (b). For purposes of applying these statutes, an official guest is defined as "a citizen or national of a foreign country present in the United States as an official guest of the Government of the United States pursuant to designation as such by the Secretary of State." 18 U.S.C. § 1116(b)(6).[13] We believe that the Secretary of State can designate a defector as an official guest solely in order to bring him within the coverage of these criminal statutes, thus enabling federal law enforcement agencies[14] to act against anyone who assaults, threatens, harasses, coerces, kidnaps, or otherwise similarly injures a defector.

As we have noted, Congress created the category of official guests because it wanted federal criminal law to "operate to protect the rights of visiting artists, academic and scientific groups," and similar groups and individuals. S. Rep. No. 1105, 92d Cong., 2d Sess. 9 (1972). Certain aspects of the legislative history suggest that Congress did not intend to permit foreign visitors to be classified as official guests simply because they were threatened. For example, in suggesting to Congress the language that became the definition of "official guest," the then Secretary of State said, "This will allow me to designate individuals or groups of individuals who are here for important international sports or other events. . . . This would accord protection to foreign nationals who visit the United States for such special reasons as to compete in international sports events." *Id.* at 15–16. In general, Congress focused on threats to visitors which were, at least in part, the result of the visitors' special role in activities of interest to both their country and ours. Congress was also concerned with the implicit obligation we have to their respective countries to protect such visitors. If these were the bases of Congress' decision to make it a crime to assault or threaten "official guests," that category cannot be extended to reach ordinary visitors who are threatened only because they have defected.[15]

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[13] The Secretary of State has delegated his authority to designate official guests to the Deputy Under Secretary of State for Management. 22 C.F.R. § 2.4.

[14] As we have said the FBI has general authority "to detect and prosecute crimes against the United States" and to conduct certain other investigations. 28 U.S.C. § 553 (1), (3). Department of State security officers are specifically authorized, "while engaged in the performance of the duties prescribed" by statute, *see* pp. 2–4 *supra,* "to arrest without warrant and deliver into custody any person violating section . . . 112 of title 18 in their presence or if they have reasonable grounds to believe that the person to be arrested has committed or is committing such a violation." Other law enforcement agencies have some authority to arrest persons they reasonably believe to have committed felonies. *See, e.g.,* 18 U.S.C. § 3056(a) (Secret Service).

The legislative history, however, contains no clear references to reciprocity, or to the fear that Americans will be inadequately protected abroad; this suggests that Congress may have been concerned less with international obligations than with our international reputation. That reputation would be injured if a defector were attacked or threatened by the nation from which he defected. Moreover, while the legislative history does not refer to the danger that defectors might be forcibly repatriated, Congress clearly had in mind politically motivated threats and acts against foreign visitors; the killing of Israeli athletes at Munich in 1972 was repeatedly cited as an example of the sort of crime which would have to be left entirely to the states if federal criminal laws were not extended to official guests. *See, e.g., id.* at 9, 15. And nothing in the statutes or their legislative history makes an exception for politically motivated violence or coercion by the nation of which the guest is a citizen.

Finally, Congress carefully considered the issues of federalism involved in creating a category of "official guests" and allowing the federal government, in addition to the states, to punish certain crimes against them. For example, the sponsor of the provision including "official guests" in the several federal criminal statutes gave, as his principal reason, "State governments simply cannot cope alone with crimes involving international politics and diplomacy." *Id.* at 9. In language we have already quoted, the Senate Committee noted that the protection would extend generally to "groups and individuals who ought not be beyond the pale of Federal concern." *Id.* This emphasis on federalism suggests that the defining characteristic of official guests is their importance to foreign policy and related concerns of the federal government; the treatment of defectors is at least as important to foreign policy as the treatment of visiting artists and athletes. In addition, if there is a possibility that a defector will be harassed or coerced by the nation from which he has defected, the federal government is likely to be involved in negotiations and diplomatic maneuvers which must be coordinated with law enforcement efforts undertaken on the defector's behalf. For these reasons, we believe that the Secretary of State can designate any defector an official guest in order to make it a federal offense to assault, harass, intimidate, coerce, imprison, threaten, kidnap, or kill the defector.

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[15] We do not believe that the Secretary of State must designate a visitor an official guest before he enters the country. The statutory definition arguably requires that an official guest be "present in the United States . . . pursuant to designation," suggesting that a person who is present in the United States on his own initiative cannot qualify as an official guest. This language is not, however, unequivocal; it does not specify that an official guest must have entered the country pursuant to a designation. The phrase "pursuant to designation as such by the Secretary of State" may, we believe, be read simply to modify "official guest," describing how one attains that status. Moreover, the legislative history indicates that the category of "official guest" was created precisely in order to provide a federal role in enforcing laws making it illegal to assault, harass, or kidnap foreign nationals visiting the United States. There seems to be little reason to insist that the Secretary must foresee, before the visitors enter the country, that they will be threatened.

LARRY L. SIMMS
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Office of Legal Counsel

Use of Foreign Vessels to Transport Petroleum from the Virgin Islands to the United States Mainland

Under the Merchant Marine Act of 1920, the President is authorized to extend the coastwise laws of the United States to the Virgin Islands, and thus mandate the use of U.S. vessels for transportation of passengers and merchandise from the Virgin Islands to the U.S. mainland.

There is a strong argument that the President is empowered to make the coastwise laws applicable to the Virgin Islands solely for the carriage of petroleum and petroleum products.

January 30, 1980

MEMORANDUM OPINION FOR THE ASSISTANT TO THE PRESIDENT FOR DOMESTIC AFFAIRS AND POLICY

Several months ago, we were informally asked by your staff to consider whether the President can require the use of U.S. vessels to transport petroleum products from the Virgin Islands to the U.S. mainland. The question is whether the President has the authority to declare that the coastwise laws of the United States shall extend to the Virgin Islands solely for the carriage of petroleum and petroleum products. While we understand that the matter is not under active review at this time, we have been advised that the results of our research are nonetheless relevant to your staff's consideration of proposals that may be considered in the future.

In general, the coastwise laws require that passengers and merchandise be transported between points in the United States in vessels built in and documented under the laws of the United States and owned by citizens of the United States.[1] 46 U.S.C. §§ 289, 877, 883. They are intended "to provide protection for American shipping by excluding foreign shipping from performance of domestic maritime business." 42 Op. Att'y Gen. 189, 196 (1963). At present the Virgin Islands are excepted from these coastwise laws. Therefore, petroleum refineries located in the Virgin Islands can transport petroleum products to United States ports on less expensive foreign vessels, thus enjoying a competitive advantage over refineries located on the U.S. mainland.

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[1] There is no statutory definition of coastwise laws but they are considered to refer to laws regulating the "coastwise trade," meaning domestic trade between ports in the United States. 42 Op. Att'y Gen. 189, 192 (1963).

We have had the benefit of separate letters prepared by the Commerce Department and the Maritime Administration expressing the view that the President has the authority to issue a proclamation making the coastwise laws applicable to petroleum. Based on our review, we agree with that conclusion. However, the case that can be made for issuance of a proclamation involves significant legal problems. These should be considered in evaluating this course of action, since it is probable that the proclamation will be challenged in litigation.

At the outset it will be useful to describe the various laws that bear on this matter and how they came to be enacted. The exception from the coastwise laws for the Virgin Islands has a complicated history, resulting from the relationship of two spearate laws: The Merchant Marine Act of 1920 and the Organic Act of the Virgin Islands, enacted in 1936.

The Merchant Marine Act of 1920 extended the coastwise laws of the United States, as of February 1, 1922, to the "island Territories and possessions of the United States not covered thereby on June 5, 1920." 46 U.S.C. § 877. This language covered the Virgin Islands, but the Act provided for an exception, if "adequate shipping service"—both commercial and passenger—was not yet established for any island territory or possession. The President was given the authority to extend the period of exemption from the coastwise laws "for such time as may be necessary for the establishment of adequate shipping facilities."

Between 1922 and 1936 every President acted, on a yearly basis, to exempt the Virgin Islands from the coverage of the coastwise laws. H.R. Rep. No. 2281, 74th Cong., 2d Sess. 1 (1936). In 1936, the Merchant Marine Act of 1920 was amended by the addition of a specific exception for the Virgin Islands:

> *And provided further,* That the coastwise laws of the United States shall not extend to the Virgin Islands of the United States until the President of the United States shall, by proclamation, declare that such coastwise laws shall extend to the Virgin Islands and fix a date for the going into effect of same.

46 U.S.C. § 877. The result of this added provision was no longer to require affirmative presidential action to continue the exemption, but rather to require that the exemption would remain in effect until the President takes action to terminate it.

The 1936 Virgin Islands proviso does not refer to the need for a finding by the President that "adequate shipping service" has been established before he could invoke the coastwise laws. The Senate had provided for such a requirement. The House Committee on Merchant Marine and Fisheries pointed out, however, that it had "no intention of weakening in any way the coastwise laws" and that "the establishment of an adequate shipping service to the islands might be prevented by the continued suspension of the coastwise laws." The Committee noted that the President would be denied "sufficient flexibility" by the requirement in the Senate bill that there first be adequate shipping before restricting the Virgin Islands trade to American shipping. Thus, under the House proviso "the President would be authorized *at any time*, by proclamation, to declare that the coastwise laws should extend to the Virgin Islands and fix a date for the going into effect of the same." (Emphasis added.) The language of the proviso was therefore viewed as a formula which would make reimposition of the coastwise laws more likely. H.R. Rep. No. 2281, 74th Cong., 2 Sess. 2 (1936).

It appears that the Executive Branch was motivated to support the bill for different reasons—the importance to the economy of the Virgin Islands of bunkering foreign vessels. Letter from Interior Secretary to House Committee on Merchant Marine and Fisheries, Jan. 9, 1935, reprinted in H.R. Rep. No. 2281, *supra* at 2–3.[2] Although the House Committee took note of this fact, *id.* at 2, as a reason for supporting the bill it is apparent that the precise language adopted by the House and ultimately accepted by the Senate was motivated by a desire to grant the President discretion easily to extend the coastwise laws.[3]

About two months later, June 22, 1936, the same Congress passed the Organic Act of the Virgin Islands, which contained a provision relating to application of laws concerning navigation and commerce:

> . . . except as otherwise expressly provided, all laws of the United States for the protection and improvement of the navigable waters of the United States and the preservation of the interest of navigation and commerce shall apply to the Virgin Islands.

49 Stat. 1808. It is not clear what effect this amendment had on application of the coastwise laws to the Virgin Islands. Repeals by implication are not favored, however, 1A *Sutherland Statutory Construction* § 23.10 (Sands ed. 1972), and since the exemption from the coastwise laws was "expressly provided" for, it is fair to conclude that the Organic Act did not reimpose the coastwise laws. It hardly seems that Congress would have reversed a policy adopted only two months earlier without explaining that it meant to do so.

It was feared, nevertheless, that the Organic Act would interfere with the shipping trade in the Virgin Islands because of other federal laws which it imposed. In 1939 legislation was passed amending the Organic Act so that these laws were no longer applicable. Specific language expressly exempted the Virgin Islands from tonnage duties, light money, and entrance and clearance fees. 53 Stat. 1242, 48 U.S.C. § 1405c(c). Moreover, the language in the Organic Act which had incorporated federal laws "for the preservation of the interest of navigation and commerce" was deleted. 53 Stat. 1242. Nothing in the 1939 amendment made the coastwise laws specifically inapplicable, which would have been technically necessary if the Organic Act had been thought to have repealed the 1936 proviso to the Maritime Act. The President was, however, again authorized to make the coastwise laws applicable at a future time. 48 U.S.C. § 1405c(d).[4]

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[2] Evidence of the same kind was collected in hearings held in 1932 on an earlier version of the legislation that did not pass. *Relating to the Application of the Coastwise Laws to the Virgin Islands, Hearings on H.R. 10329 before the House Committee on Merchant Marine, Radio, and Fisheries*, 72d Cong., 1st Sess. (1932).

[3] The Senate report relied on the Executive position, S. Rep. 1010, 74th Cong., 1st Sess. (1935), but, since Congress enacted the bill in the precise form recommended by the House, that report should be viewed as more authoritative. The Senate concurred in the House amendment without comment. 80 Cong. Rec. 5069 (1936).

Thus, as of 1939 there was *one* law making the coastwise laws inapplicable—the 1936 proviso to the Merchant Marine Act of 1920, 46 U.S.C. § 877—but two which permitted the President to make them applicable, the same proviso and the 1939 amendment to the Organic Act, 48 U.S.C. § 1405c(d).

As of today, it seems that the Organic Act may no longer be relied on as authority to apply the coastwise laws. This is because the 1936 Organic Act was replaced by a Revised Organic Act in 1954, which states:

> The laws of the United States applicable to the Virgin Islands on July 22, 1954, including laws made applicable to the Virgin Islands by or pursuant to the provisions of the Act of June 22, 1936 . . . shall, to the extent they are not inconsistent with this chapter, continue in force and effect until otherwise provided by Congress. . . .

48 U.S.C. § 1574(c). This provision requires some interpretation as to what is meant by "laws made applicable" to the Virgin Islands by the 1936 Organic Act. There is thus a question whether this provision effectively repealed § 1405c, or whether it, in fact, carried forward the President's proclamation power. In the only case so far to address the issue of repeal, the Third Circuit said "[i]t . . . seems clear that the Revised Organic Act of 1954 operated to repeal the Organic Act of 1936." *Virgo Corp.* v. *Paiewonsky,* 384 F.2d 569, 578 (3d Cir. 1967), *cert. denied,* 390 U.S. 1041 (1968).

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[4] The reports on the 1939 amendment do not indicate that the coastwise laws had been imposed after 1936 or that the amendment was necessary to make them inapplicable. They state that the purpose of the amendment was to make inapplicable "Federal navigation and other laws" which prevent the Virgin Islands from competing with other ports. S. Rep. No. 808, 76th Cong., 1st Sess. 1 (1939); H.R. Rep. No. 1314, 76th Cong., 1st Sess. 1 (1939). This seems to be a reference not to the coastwise laws but to the various fees specifically covered by the amendment. The fact that the coastwise laws had not been imposed is supported by the statement in the report that the bunkering business "*may* be adversely affected" unless the bill passed. (Emphasis added.) If they had been applied then the trade would have been largely eliminated.

Nevertheless, the court also observed: "We find no indication in the Revised Organic Act that the Congress intended any part of the Act of 1936 to remain in force after the Revised Organic Act took effect, except those provisions of the Act of 1936 which had made certain laws of the United States applicable to the Virgin Islands." *Id.* at 576. Since the holding of the case did not involve these provisions, it is not clear whether a court would find that the President, under "applicable" law, could still issue a proclamation under the Organic Act or whether only Congress could do so.

The closest direct authority appears to be a footnote in an opinion of the Attorney General stating that the President could no longer amend Executive Order No. 9170 as a result of the passage of the Revised Organic Act. 42 Op. Att'y Gen. 189, 190 n.2 (1963). As a result any attempt to use the old Organic Act as authority is clouded.[5]

This sketch of the tangled legislative history of these Acts strongly suggests that whatever authority there is for the President's ending the exemption derives from the Merchant Marine Act of 1920. It leads to two further questions: (1) whether the President can apply only one of the coastwise laws, *i.e.,* 46 U.S.C. § 877, relating to carriage of merchandise, to the exclusion of other coastwise laws; and (2) whether he can apply it to a particular type of vessel—oil tankers.

The language of the Merchant Marine Act does not answer the questions clearly. It states, 46 U.S.C. § 877, "[t]hat the coastwise laws of the United States shall not extend to the Virgin Islands . . . until the President . . . shall . . . declare that such coastwise laws shall extend. . . ." The amended (and presumably repealed) Organic Act, 48 U.S.C. § 1405c(d), stated: "the President shall have power to make applicable to the Virgin Islands such of the navigation, vessel inspection, and coastwise laws . . . as he may find and declare to be necessary in the public interest. . . ." The difference between the former ("such coastwise laws") and the latter ("such of the . . . coastwise laws") may be more than semantic: the latter seems to give the President the authority to apply "parts" of the coastwise laws, while the former does not as readily lend itself to this interpretation.

This alone should not be determinative. In deciding what Congress intended one should keep in mind that the "coastwise laws" are not a simply defined body of law but a traditional reference to a series of acts passed at different times for different reasons. For example, the Foreign Dredge Act, 46 U.S.C. § 292, has been found by the Attorney General to be one of the coastwise laws. 42 Op. Att'y Gen. 189 (1963). Since 46 U.S.C. § 877 seems to be primarily concerned with adequate shipping service, it would seem, for example, that the President might issue a proclamation relating to the coastwise laws as they related to shipping but not include the Foreign Dredge Act. It is our conclusion that the coastwise laws should not be considered indivisible but should be judged in light of congressional intent.

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[5] This also undercuts the argument made by both the Commerce Department and the Maritime Administration that Executive Order No. 9170, May 21, 1942, serves as a precedent for selective Presidential action in this area. That order was based upon the language of the old Organic Act. Even if this were not so, it is not at all clear that the order applied selective parts of statutes. *See* 42 Op. Att'y Gen., *supra* at 198–99.

A more difficult question is whether the President could make the coastwise laws applicable only to oil tankers. Again, there is a strong argument that Congress sanctioned such action. When it enacted the Virgin Islands proviso in 1936, Congress was interested in giving the President "flexibility" in restoring the coastwise laws and authorized him to issue a proclamation "at any time." H.R. Rep. No. 2281, 74th Cong., 2d Sess. 2 (1936). If the President were faced with a situation where there was a glut of domestic tanker capacity due to decreased shipments from abroad, but no prospect that any other type of domestic shipping would be adequate to meet the needs of the Virgin Islands, it may well be that Congress, in protecting the domestic fleet, would rather have the coastwise laws apply in limited fashion to oil tankers rather than not have it apply at all. This theory is untested, of course, and would be subject to judicial challenge, but we cannot say that it would be unsuccessful.[6]

We would be pleased to provide whatever further assistance you may require. In light of the complexity of this particular statutory structure, and given the probability of eventual litigation, it is apparent that careful consideration of any proposal is merited.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

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[6] A question may be raised as to whether Congress may constitutionally delegate to the President flexibility of the kind argued for here. This provision, however, is considerably narrower in its scope than others permitting the President to determine the terms on which foreign and domestic commerce may compete and which have been held to meet constitutional standards. *United States* v. *Yoshida International, Inc.*, 526 F.2d 560, 582 (C.C.P.A. 1975); *cf. FEA* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 558 (1976); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936).

Status of Nonimmigrant Alien Temporary Workers During a Strike

Conclusion of prior opinion, 3 Op. O.L.C. 179 (1979), relating to status of nonimmigrant alien soccer players during a strike in North American Soccer League, reconsidered and affirmed.

There may be situations in which Immigration and Naturalization Service regulation requiring a nonimmigrant temporary worker, as a condition of his or her continued stay in this country, to cease working during a strike, would be sustained as a valid exercise of the Attorney General's authority under the Immigration and Nationality Act.

February 1, 1980

MEMORANDUM OPINION FOR THE ACTING COMMISSIONER IMMIGRATION AND NATURALIZATION SERVICE

This responds to your request that we reconsider our opinion of April 18, 1979 [3 Op. O.L.C. 179 (1979)] relating to the status of nonimmigrant alien temporary workers during a labor dispute. In this opinion, prepared in the context of a then-existing strike called by the North American Soccer Players League, we concluded that the Immigration and Nationality Act (INA) and applicable regulations of the Immigration and Naturalization Service (INS) neither barred nonimmigrant alien players employed by the League from continuing work during the strike, nor required their deportation if they honored or refused to honor the strike. Subsequently, in July of 1979, having been provided with documents suggesting that the INS regulation in question had been administratively construed to require nonimmigrant alien temporary workers to cease working during a strike, we expressed doubts as to whether that regulation would be upheld in a situation such as the soccer strike. [3 Op. O.L.C. 294 (1979).]

Since our earlier opinions were prepared, we have been provided more specific factual information about the relationship between the regulation's requirement as so construed and the INA itself. In response to your request, we have undertaken a reexamination of our earlier conclusions in light of this information, focusing now more generally on the question of the Attorney General's power under the INA to require a nonimmigrant temporary worker, as a condition of his or her continued stay in this country, to cease working during a strike. While we believe our earlier opinions correctly state the law, we are persuaded that there may be situations in which a sufficient relationship would be found between such a requirement and the legislative purposes underlying the INA to sustain it as a valid exercise of the Attorney General's authority under the Act.

The INS regulation in question appears at 8 C.F.R. § 214.2(h)(10) (1981) and reads as follows:

> A petition shall be denied if a strike or other labor dispute involving a work stoppage or layoff of employees is in progress in the occupation and at the place the beneficiary is to be employed or trained; if the petition has already been approved, the approval of the beneficiary's employment or training is automatically suspended while such strike or other labor dispute is in progress.

When this Office was initially asked to advise whether, pursuant to this regulation, nonimmigrant alien soccer players on H-1 and H-2 visas [1] were required to cease working during the pendency of a strike, we had before us no information as to the original purpose of the regulation and were advised that no such information was available. Further, we understood that there was no helpful history of its application to provide guidance as to its meaning. By its terms, however, the regulation appeared to be intended to prevent an employer involved in a labor dispute from importing nonimmigrant aliens as strike-breakers. As applied to aliens whose employment would begin after the commencement of the strike, the regulation seemed only to give particular content to the statutory requirement that nonimmigrant alien temporary workers not be admitted if unemployed persons capable of performing the requested service or labor could be found in this country, since it could reasonably be concluded that the requisite determination in this regard could not be made while a strike was in progress.

We expressed doubt, however, that the regulation could properly be interpreted to require the automatic suspension of the employment approval of nonimmigrant aliens who were already in the country and working at the time the strike occurred. Our reasoning was that any such aliens presumably could only have been admitted after a finding that unemployed workers capable of performing the duties could not be found in this country, and that the mere existence of a strike did not suggest that capable domestic workers could be found, thereby warranting suspension of approval of the alien's employment. In this case, therefore, we could not see that the automatic suspension of work approval was rationally related to the purposes of the Act and thus within the Attorney General's authority.

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[1] Under the INA, nonimmigrant aliens may, upon petition by an employer, be admitted into the country on a temporary basis (1) to perform services of an exceptional nature requiring distinguished merit and ability or (2) to perform services or labor "if unemployed persons capable of performing such service or labor cannot be found in this country. . . ." 8 U.S.C. § 1101(a)(15)(H)(i) and (ii).

A second reason for reading the regulation so as not to bar continued employment of the nonimmigrant alien soccer players was found in the National Labor Relations Act (NLRA), which has been construed by the National Labor Relations Board to apply to nonimmigrant alien temporary workers. Section 7 of that Act, 29 U.S.C. § 157, affords employees the right to decide whether or not to engage in concerted activity, including whether or not to participate in or honor a strike. If the INS regulation were to be interpreted to require the automatic suspension of employment approval whenever a strike occurs, nonimmigrant alien temporary workers would effectively be deprived of the freedom to decide not to honor the strike. We concluded that the regulation should not be interpreted in a manner which would occasion this result.

On July 18, 1979, we responded to a request from Secretary of Labor Marshall that we reconsider our April 18 opinion. Having in the interim had an opportunity to review a number of documents that were not available to us at the time our original opinion was prepared, we concluded that the regulation in question did appear to have been administratively construed (although never actually applied) to require a nonimmigrant to cease working during a strike. However, focusing now not on the meaning of the regulation but on its validity, we expressed our continuing doubts as to whether the regulation would be upheld if applied in a situation such as the soccer strike. Our reasoning remained essentially the same as that in our original opinion. First, the broad and unconditional requirement that an employee withhold his services during a work stoppage appeared to impinge upon the individual's rights under § 7 of the NLRA, and potentially to upset the balance struck by Congress under that Act between labor and management, without serving any discernible purpose under the INA. And second, while the Attorney General's authority under the Act to impose conditions upon a nonimmigrant's visa is very broad, in the absence of specific factual information about how the regulation related to the purposes of the INA, we questioned whether it extended this far. As explained in our response to Secretary Marshall, we had been pointed to no specific instances of employer "stockpiling" or other abuses of the temporary worker system that enforcement of the regulation could resolve.

We closed our letter to Secretary Marshall by recognizing that, while it is generally appropriate for INS to maintain a neutral role in a labor dispute, there may be situations in which it would be equally appropriate under the INA to limit alien involvement in domestic labor disputes. We informed him that we had agreed to assist INS in drafting a regulation that would be more precisely tailored to the purposes of the INA and less likely to precipitate conflicts with the NLRA.

Since our July 18 letter to Secretary Marshall, we have had brought to our attention, most notably by the Solicitor's Office in the Labor Department, specific factual information that purports to relate the regulation to the purposes of the INA. In addition, the broad ambit of the Attorney General's authority under that Act to impose conditions on nonimmigrant aliens has received recent judicial reaffirmation. *Narenji* v. *Civiletti*, 617 F.2d 745 (D.C. Cir.), *cert. denied*, 446 U.S. 957 (1979). Finally, your memorandum of January 4, 1980, suggests that certain modifications in the regulation itself are under consideration; some of these narrow its reach to situations in which its enforcement could be shown or at least reasonably presumed to be furthering the purposes of the INA, and so limit its operation to employees not covered by the NLRA, such as agricultural workers. While we continue to believe that difficult legal questions would be presented by the enforcement of the regulation in many situations, even if it were modified in one or more of the ways suggested in your memorandum, we cannot say that there are no circumstances in which it would be permissible to require nonimmigrant alien temporary workers to cease working during a strike.

The courts have recognized that an underlying purpose of the INA's restrictions on immigration is the protection of domestic workers, a purpose that extends to its provisions on nonimmigrant temporary workers as well. *See, e.g., Flecha* v. *Quiros*, 567 F.2d 1154, 1155 (1st Cir. 1977). The importation of temporary alien workers should not operate to depress domestic wages, nor otherwise hinder efforts by domestic workers to improve their wages and working conditions. If it is true, as the Labor Department has contended, that "[c]ontinued employment of temporary aliens during a strike could have an adverse effect on the wages and working conditions of the striking domestic employees by helping to defeat the strike," some measures to prevent this result may be appropriate under the INA.

The Labor Department has also argued that nonimmigrant temporary workers have as a practical matter little true freedom of choice as to whether to participate or not participate in a strike. Barred by law from accepting employment elsewhere, they are peculiarly susceptible to pressure to remain on the job. Their rights under § 7 of the NLRA are, in Labor's view, "illusory." Far from assuring government neutrality in labor disputes, permitting the continued use of alien labor during a strike would, it is said, tip the balance of economic weapons in management's favor.

We are inclined to agree that a regulation tailored to meet the particular problems described by the Labor Department—the peculiar susceptibility of nonimmigrant temporary workers to employer pressure, and the threat this poses for efforts by domestic workers to improve their working conditions through collective action—might well be held to be an appropriate attempt by the government to preserve for itself a more nearly neutral role in labor-management relations. The situation in which we think such a regulation is most likely to be held a valid exercise of the Attorney General's power under the INA is that in which temporary workers are not protected by those federal labor laws which secure an individual's freedom to participate or not in concerted activities. Not only is there no potential conflict with those laws posed by the regulation's enforcement in this situation, but there is greater likelihood that nonimmigrants will remain on the job under pressure if they have no hope of federal assistance against employer retaliation.

We remain troubled, however, by the notion that a nonimmigrant's stay in this country could be conditioned on his not doing precisely what he was brought here to do, *i.e.*, to work for the petitioning employer. Unlike a prohibition on unauthorized employment by students or visitors, or a regulation requiring a student to request permission from INS before transferring to a new school, the automatic suspension of work approval in the event of a strike seems unrelated to the definition and maintenance of the particular nonimmigrant status of a temporary worker.

The fact that the present regulation can be enforced only through the institution of deportation proceedings adds to our concern. As we stated in our letter to Secretary Marshall, a rule which triggers the penalty of deportation without some finding that the grounds of entry no longer exist, or that there are some statutory grounds for deportation, seems likely to be found unreasonable in many situations. We think it would present particularly troublesome issues if invoked to deport an individual solely because he chose not to participate in a strike against his employer.

On balance, while we think the legal questions raised by a work suspension requirement are close ones in any case, and likely to be quite fact-sensitive, we cannot say that the Attorney General does not have the power under the INA to fashion such a regulation under some circumstances. As is suggested by the preceding discussion, any such regulation should be precisely tailored to deal with the potential abuses pointed out by the Labor Department. In addition to those modifications you suggest,[2] it might be prudent to incorporate a provision affording a petitioning employer, and possibly the beneficiary of the petition as well, an opportunity to demonstrate that the nonimmigrant's continuing to work during a strike would not adversely affect the wages and working conditions of domestic workers, in helping to defeat the strike or otherwise. In the event such a showing could be made, a corresponding accommodation in enforcing the regulation would seem in order.

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[2] We do not mean to imply a preference for any particular modification, nor to suggest that any (or all) of those suggested in your memorandum would be necessary to sustain the regulation's validity in all cases.

As in the past, we would be pleased to continue to work with you in reviewing language designed to achieve a fact-specific, case-by-case mechanism for dealing with the effect of strikes and work stoppages on nonimmigrant alien workers.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

Applicability of Control of Paperwork Amendments of 1978 to Certain Activities of the Civil Rights Division

Control of Paperwork Amendments of 1978, which impose restrictions on federal agencies' collection of data from educational institutions, do not apply to collection of data by the Department of Justice in connection with school desegregation litigation.

February 6, 1980

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

This responds to your request for an opinion on the applicability of the Control of Paperwork Amendments of 1978, 20 U.S.C. § 1221-3 (Amendments), to your Division's collection of information from educational institutions in connection with the litigation of school desegregation cases. More specifically, you ask whether your division's litigation of school desegregation cases is a "federal education program" under the Amendments. You identified the following three categories of information-collecting activities conducted by your Division in connection with such cases:

(1) Formal discovery requests in active school desegregation cases;

(2) Collection of information from defendants in inactive school desegregation cases to determine whether the cases should be dismissed; and

(3) Collection of information from educational institutions for the purpose of determining whether litigation should be initiated.

Because your Division conducts all of the above activities in connection with your litigating responsibilities and compliance with the Amendments' restrictions would interfere with the enforcement of federal antidiscrimination statutes, we conclude that the Amendments do not apply to such activities. For that reason, any regulations promulgated to implement the Amendments similarly would not apply to those activities.

The Control of Paperwork Amendments of 1978 were enacted to coordinate the collection of data from educational institutions by federal agencies "[i]n order to eliminate excessive detail and unnecessary and redundant information requests and to achieve the collection of information in the most efficient and effective possible manner. . . ." 20 U.S.C. § 1221-3(a)(1)(A). Under the statute, the Secretary of Education [1] must approve requests by federal agencies for data and information directed to educational institutions. Each agency is required to submit to the Secretary a plan for each collection of information indicating how the information will be used, the methods of analysis that will be applied to such data, a timetable for the dissemination of the collected data and an estimate of the costs and man-hours that will be incurred by each educational institution in completing the request and by the federal agency in collecting, processing, and analyzing the information. 20 U.S.C. § 1221-3(b)(1). The Secretary is required to ensure that each request has been approved and publicly announced by the 15th of February preceding the beginning of a new school year, unless there is an urgent need for the information or very unusual circumstances. 20 U.S.C. § 1221-3(b)(2)(A). Prior to approval, each educational agency subject to a request is afforded a 30-day period to comment to the Secretary on the information request. 20 U.S.C. § 1221-3(b)(3).

The Amendments set forth two conditions for its applicability to information requests by federal agencies:

(1) The respondents must be primarily educational agencies or institutions; *and*

(2) The purpose of a federal agency's activities must be to obtain information needed for the management of, or the formulation of, policy related to federal education programs or research or evaluation studies related to the implementation of federal education programs. 20 U.S.C. § 1221-3(a)(1)(A).

Because your information-collection activities are directed at educational institutions, the first condition is satisfied and the applicability of the Amendments depends, therefore, upon whether your activities meet the second condition. For two reasons, we conclude that they do not. First, the information you collect is needed to decide whether to initiate, maintain, or discontinue litigation, not to manage or formulate policy or to conduct research or evaluation studies. Moreover, even if a decision to initiate or discontinue litigation could be viewed as formulating policy, we believe that your litigating activities are not "federal education programs" for the purpose of the Amendments. It is true that a construction of the Amendments must be guided by the Conference Report's direction that they are "to be interpreted broadly so as to include as many activities as possible." H.R. Rep. No. 1753, 95th Cong., 2d Sess., 313 (1978). But a construction that would include school desegregation litigation as a "federal education program" would strain the meaning of that term far beyond common understanding of what constitutes an education program. Nothing in the legislative history of the Amendments warrants such a construction. Moreover, the Amendments explicitly provide:

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[1] The Act originally required the Secretary of Health, Education and Welfare to approve such requests. However, under the Department of Education Organization Act, Pub. L. No. 96-88, § 301(a)(2)(D), 93 Stat. 677 (1979), this function was transferred to the Secretary of Education.

> Nothing in this section [20 U.S.C. § 1221-3] shall be construed to interfere with the enforcement of the provisions of the Civil Rights Act of 1964 or any other nondiscrimination provision of Federal law.

20 U.S.C. § 1221-3(b)(6). In our view, this provision[2] militates against regarding your litigating activities as education programs. If the Amendments were construed to cover such activities, your Division would have to comply with their restrictions on information requests each time you requested information from each school defendant or target of investigation. Compliance with the Amendments' comment period and public announcement requirement when litigating a case or deciding to institute or discontinue litigation would undoubtedly substantially interfere with the expeditious enforcement of federal nondiscrimination laws.

For these reasons we conclude that the term "federal education program" is not to be construed to encompass the information collection activities involved here. Accordingly, the definition of "federal education program" in the interim procedures[3] promulgated by the Department of Health, Education, and Welfare under the Act is not to be construed to encompass such activities.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

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[2] The legislative history of the Amendments contains no discussion of this provision, which was included in both the House and Senate bills. H.R. Rep. No. 1137, 95th Cong., 2d Sess. 134-38, 177 (1978); S. Rep. No. 856, 95th Cong., 2d Sess. 5, 112-16, 158-59 (1978); H. Conf. Rep. No. 1753, 95th Cong., 2d Sess. 313-15 (1978). The provision appears to have its origin in the Education Amendments of 1976, § 406, 90 Stat. 2231, which restricted only the Education Division and the Office of Civil Rights in the Department of Health, Education and Welfare in their collection of information. The restrictions along with the proviso were added on the floor of the Senate, 122 Cong. Rec. 28017-28020 (1976), and survived the Conference. H. Conf. Rep. No. 1701, 94th Cong., 2d Sess. 242 (1976).

[3] The interim procedures define "Federal Education Program" as "any Federal activity with a primary purpose of offering instruction, financing instruction, or affecting an educational agency's or institution's ability to offer instruction or provide access to education." 44 Fed. Reg. 46535, 46538 (1979).

Presidential Authority Under the Trade Expansion Act to Adjust Shipments of Oil to and from Puerto Rico

Neither the uniformity of duties clause of the Constitution, Art. I, § 8, cl. 1, nor the port preference clause, Art. I, § 9, cl. 6, require uniformity of import quotas between the mainland and Puerto Rico.

The President has authority under § 232(b) of the Trade Expansion Act of 1962 to impose separate quantitative restrictions on oil imports into the U.S. mainland and Puerto Rico, respectively.

Any system of separate quotas imposed under the Trade Expansion Act must be justified by national security concerns.

By implication, § 232(b) authorizes the President to impose quotas on shipments of oil from Puerto Rico to the U.S. mainland in order to make the separate import quotas effective.

February 6, 1980

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF THE TREASURY, AND THE GENERAL COUNSEL, DEPARTMENT OF ENERGY

This responds to your request for our opinion on several questions relating to the importation of oil through Puerto Rico. Section 232(b) of the Trade Expansion Act of 1962, 19 U.S.C. § 1862(b), authorizes the President to "take such action . . . as he deems necessary to adjust the imports of [an] article . . . so that such imports will not threaten to impair the national security. . . ." The President may do so after the Secretary of the Treasury has completed an investigation and has concluded that the article "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security. . . ." On March 14, 1979, the Secretary of the Treasury completed such a report and concluded that imports of oil and certain oil products threatened to impair the national security. *See* 44 Fed. Reg. 18818 (1979). On July 15, 1979, the President announced that he would impose an oil import quota. *See* 15 Weekly Comp. Pres. Doc. 1235 (July 23, 1979). You asked for our analysis of three questions concerning the form of that quota:

(1) May the President adjust shipments of oil, which are derived from Puerto Rican oil imports, from Puerto Rico to the U.S. mainland pursuant to his authority under § 232(b) of the Trade Expansion Act?

(2) Does the answer to the first question depend on whether oil imported into Puerto Rico is itself adjusted under the § 232(b) authority?

(3) If the answer to the second question is affirmative, what kind of adjustment of Puerto Rican oil imports will suffice? Specifically, may the adjustment involve an unrestricted quota for imports into Puerto Rico intended for Puerto Rican consumption with an accompanying limitation on shipments from Puerto Rico to the U.S. mainland?

For the reasons that follow, we believe that the President may impose a quantitative restriction on shipments of oil from Puerto Rico to the U.S. mainland if that restriction is reasonably ancillary to a system of import adjustments, imposed under § 232(b), that applies to both the mainland and Puerto Rico. That system of adjustments need not be a single quota for the entire combined territory of the mainland and Puerto Rico; the President may impose separate quotas on Puerto Rico and the mainland respectively. The separate quota for Puerto Rico may be unlimited even if imports into the mainland are limited. We believe that this is the most defensible basis for restricting shipments from Puerto Rico to the mainland.[1]

I. The President May Impose Separate Quotas on Imports into the Mainland and Puerto Rico, Respectively.

As this Office has previously concluded, the Constitution does not prevent Congress from authorizing the President to impose separate quotas on different regions. Section 232(b) is an exercise of Congress' power to regulate foreign commerce. *See* U.S. Const., Art. I, § 8, cl. 3. It is well established that regulations of commerce need not be uniform, *see, e.g., Currin* v. *Wallace*, 306 U.S. 1, 13–14 (1939); *see also Mulford* v. *Smith*, 307 U.S. 38, 48–49 (1939), unless some other constitutional provision—such as the uniformity of duties clause, Art. I, § 8, cl. 1,[2] or the port preference clause, Art. I, § 9, cl. 6 [3]—requires uniformity. The uniformity of duties clause probably does not apply to Puerto Rico. *See Rasmussen* v. *United States,* 197 U.S. 516, 520 (1905); *Downes* v. *Bidwell,* 182 U.S. 244 (1901).[4] The port preference clause may or may not apply to Puerto Rico. *See, e.g., Secretary of Agriculture* v. *Central Roig Refining Co.,* 338 U.S. 604, 616 (1950) (a "vexing problem"); *Alaska* v. *Troy,* 258 U.S. 101, 111–12 (1922). But even if it does apply, it would not proscribe separate quotas for the mainland and Puerto Rico respectively. The net effect of separate quotas may be to benefit mainland ports at the expense of Puerto Rican ports, or vice versa, but legislation does not violate the port preference clause merely because it "greatly benefit[s] particular ports and . . . incidentally result[s] to the disadvantage of other ports. . . ." *Louisiana Public Service Commission* v. *Texas & New Orleans Railroad Co.,* 284 U.S. 125, 131 (1931). *See also Alabama Great Southern Railroad Co.* v. *United States,* 340 U.S. 216, 229 (1951).

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[1] If the President uses this approach, he will not have to interpret "imports" in § 232(b) to include shipments from Puerto Rico to the mainland. This interpretation is questionable. There appear to be no other statutes that explicitly define shipments from Puerto Rico to the mainland as "imports." *See, e.g.*, 15 U.S.C. §§ 2001(10), 2052; 16 U.S.C. § 1159(f); 42 U.S.C. § 6291(a)(11). Puerto Rico is included in the "customs territory of the United States" for tariff purposes. 19 U.S.C. § 1202 headnote 2. It is unclear whether shipments from Puerto Rico to the mainland are "imports" for constitutional purposes. *Compare Hooven & Allison Co.* v. *Evatt*, 324 U.S. 652, 668–79 (1945), *with id.* at 670 n.5 *and Dooley* v. *United States*, 183 U.S. 151, 154–55 (1901).

[2] "[A]ll Duties, Imposts and Excises shall be uniform throughout the United States."

[3] "No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another."

> [T]he clause, in terms, seems to import a prohibition against some positive legislation by congress [looking to a direct privilege or preference of the ports of any particular State over those of another] . . . , and not against any incidental advantages that might possibly result from the legislation of congress upon other subjects connected with commerce, and confessedly within its power.

Pennsylvania v. *Wheeling & Belmont Bridge Co.,* 59 U.S. (18 How.) 421, 435 (1856). This distinction is not easy to draw, but the Supreme Court seems never to have invalidated legislation under the clause simply because it affects the prosperity of different States' ports differently. *See, e.g., Louisiana Public Service Commission* v. *Texas & New Orleans Railroad Co.,* 284 U.S. 125, 131–32 (1931). Moreover, in *Secretary of Agriculture* v. *Central Roig Refining Co.,* 338 U.S. 604, 616 (1950), the Court brushed aside the suggestion that a system of regional quotas might violate the port preference clause. *Central Roig* involved production and marketing quotas, not import quotas, but their effect was similar to the effect that might be expected from a system combining a restrictive quota on oil imports into the mainland with an unlimited quota on shipments into Puerto Rico.[5] For these reasons, this Office has previously expressed the view that the port preference clause does not prohibit a system of regional quotas as opposed to a single overall national quota; therefore it would not proscribe separate quotas for the mainland and Puerto Rico. Thus, separate quotas seem to pose no constitutional problem.

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[4] In *Downes* v. *Bidwell* the Supreme Court held that the uniformity clause applied only to the states and to those territories that have been incorporated into the United States. 182 U.S. at 251, 287. The Court has also decided that statutes that governed the status of Puerto Rico between 1900 and 1950 did not incorporate it into the United States within the meaning of *Downes. See, e.g., id.; Balzac* v. *Puerto Rico,* 258 U.S. 298, 305–13 (1922). This Office has expressed the view that statutes currently in force do not change Puerto Rico's status in this respect. But § 2 of the Foraker Act, 48 U.S.C. § 739, has an effect similar to that of the uniformity of duties clause and does limit the President's power under § 232(b).

[5] More recently, the Court has held that another clause that appears to require geographical uniformity—the bankruptcy clause, Art. I, § 8, cl. 4—permits explicit distinctions between or among regions. "The uniformity provision does not deny Congress power to take into account differences that exist between different parts of the country, and to fashion legislation to resolve geographically isolated problems." *Blanchette* v. *Connecticut General Insurance Corps. (Regional Rail Reorganization Act Cases),* 419 U.S. 102, 159 (1974); *see id.* at 160–61 (comparing uniformity requirement of bankruptcy clause with Art. I, § 8, cl. 1, the uniformity of duties clause).

Whether Congress has authorized the President to impose separate quotas is a more difficult question. Section 232(b) does not expressly confer such power on the President, but it does grant power in broad terms without expressly withholding the authority to impose separate quotas. As the Supreme Court has said:

> Section 232(b) authorizes the President to act after a finding by the Secretary of the Treasury that a given article is being imported "in such quantities or *under such circumstances* as to threaten to impair the national security." [Emphasis added.] The emphasized language reflects Congress' judgment that "not only the quantity of imports . . . but also the circumstances under which they are coming in: their use, their availability, their character" could endanger the national security and hence should be a potential basis for Presidential action.

Federal Energy Administration v. *Algonquin SNG, Inc.*, 426 U.S. 548, 561 (1976), *quoting* 104 Cong. Rec. 10542–43 (1958) (remarks of Representative Mills).

The legislative history of § 232(b) and its predecessors, moreover, makes it plain that the President was to consider the domestic effects of imports. In this respect, § 232(b) contrasts sharply with several statutes which delegate power to the President but instruct him to focus on international concerns. *See, e.g.,* 19 U.S.C. § 2132 (correcting balance of payments disequilibria); 50 U.S.C. §§ 1701–1706 (international emergency economic powers). Specifically, when Congress enacted § 232(b) it wanted the President to address himself to the effects of imports on various domestic industries that it thought were important to national security.[6] *See* § 232(c), 19 U.S.C. § 1862(c). The needs of "national security" industries may, of course, differ from region to region. A single, overall national quota might be a very crude and ineffective way of serving those needs; since Congress wanted the President to serve them, it is reasonable to suppose that Congress authorized him to use more refined methods. *See Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 561–62 (1976). Different regional quotas are one of the obvious refinements that Congress might have envisioned.

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[6] For example, the hearings leading up to the predecessor of § 232(b) dealt extensively with the effects imports had on industries that witnesses believed vital to the nation's security. *See Hearings on H.R. 1 ("Trade Agreements Extension") before the House Comm. on Ways and Means,* 84th Cong., 1st Sess. 178–79, 194–95, 883–85, 1000, 1006–13, 1051–54, 1266, 1308–09, 1327–28, 2118–24 (1955); *Hearings on H.R. 1 ("Trade Agreements Extension") before the Senate Comm. on Finance,* 84th Cong., 1st Sess. 113–15, 331–55, 602, 721, 878–88 (1955). The Senate Report on this provision said that "[t]he Committee believes that this amendment will provide a means for assistance to . . . various national defense industries." S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955). The Senate floor debate focused on whether § 232(b) would protect the leading industries of various Senators' states. *See, e.g.,* 101 Cong. Rec. 5297–99 (1955).

Indeed, Presidents have imposed regional quotas since they began using their § 232(b) power. In general, separate quotas were set for the area west of the Rockies, the area east of the Rockies, and Puerto Rico. *See, e.g.*, § 2 Proclamation No. 3279, 24 Fed. Reg. 1781, 1783 (1959). So far as we have been able to determine, no court has ever decided whether imposing these regional quotas exceeded the President's authority under § 232(b).[7] But Congress reenacted the provisions of § 232(b) while regional quotas were in force without specifying that the President had no power to impose them. *See, e.g.*, Trade Expansion Act of 1962, Pub. L. No. 87–794, § 232(b), 76 Stat. 872, 877 (1962), *reenacting* Trade Agreements Extension Act of 1958, Pub. L. No. 85–686, § 8, 72 Stat. 673, 678 (1958). The Supreme Court has said that such reenactments can indicate that Congress accepted the President's interpretation of the statute. *Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 570 (1976); *see, e.g.*, *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 313–15 (1933). For these reasons, we believe that § 232(b) permits the President to impose separate quotas on the mainland and Puerto Rico.

To say that § 232(b) permits separate quotas, however, is not to say that they may be imposed for any reason. Section 232(b) authorizes the President only to "take such action, and for such time, as he deems necessary to adjust the imports of [an] article . . . so that such imports will not threaten to impair the national security. . . ." Any system of separate quotas, then, must be justified by national security concerns. The March 14, 1979, findings of the Secretary of the Treasury endorse import adjustment as a way "to reduce domestic oil consumption and increase domestic production of oil and other sources of energy." 44 Fed. Reg. 18818, 18819, 18823 (1979). The legislative history of § 232(b) firmly establishes that increasing the domestic production of oil is a legitimate national security aim; recent practice, acquiesced in by the Supreme Court, suggests that reducing the consumption of oil is similarly comprised by "national security." *See Federal Energy Administration* v. *Algonquin SNG, Inc.*, 426 U.S. 548, 553–55 (1976). We understand that the reason for imposing a separate quota on Puerto Rico is that, since the island has no indigenous oil, any gains from limiting its imports will be outweighed by the risk of severe economic dislocation. We believe that this too is a suitable national security justification. Section 232(c), 19 U.S.C. § 1862(c), makes it plain that economic dislocation which results from *excessive* imports is the sort of impairment of the national security that the President may act to prevent:

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[7] In *New England Governors' Conference* v. *Morton*, Civ. No. 72–13–59 (D. Me. Sept. 7, 1973), the system of regional quotas was challenged, but the complaint was voluntarily dismissed.

> In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

Section 232(c), 19 U.S.C. § 1862(c). Whatever exactly the national security is,[8] there is no reason to believe that economic dislocations with this origin threaten it more than similar dislocations caused by *insufficient* amounts of imported goods. Congress' unrestrictive language—"without excluding other factors"—suggests that it would not have opposed this interpretation. Thus, if the President concludes that a strict import quota would enhance national security on the mainland but only impair it further in Puerto Rico by disrupting the island's economy, § 232(b) authorizes him to impose separate quotas. Moreover, we see nothing in § 232(b) that prohibits the President from specifying an unlimited quota for Puerto Rico, if that is what the national security demands.[9] In any event, the link between the national security and the quota system which the President finally chooses should be stated in the materials accompanying the proclamation of the quota.

We emphasize that we are discussing only the legality of separate quotas—that is, separate quantitative restrictions—for Puerto Rico and the mainland. In 1970, this Office advised the Executive Director of the Cabinet Task Force on Oil Import Control that, under § 232(b), the President cannot impose tariffs or fees on products entering Puerto Rico that differ from those he imposes on the same products entering the continental United States. We reached this conclusion on the basis of § 2 of the Foraker Act, 48 U.S.C. § 739, which provides, in part:

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[8] Apparently the national security requirement of § 232(c) has never been interpreted by a court.

[9] A letter to this Office from the Deputy General Counsel of the Department of Energy asks whether the President can regulate shipments of crude oil and its derivatives from Puerto Rico to the mainland if imports of crude oil into Puerto Rico are not adjusted under § 232(b). As we have said, the most appropriate basis for regulating shipments of oil from Puerto Rico to the mainland would be that such regulation is necessary to enforce a system of import adjustments, imposed under § 232(b), that embraces both the mainland and Puerto Rico. *See* p. 2 and n.1 *supra*. But since the national security apparently would justify the President's allowing unlimited imports into Puerto Rico as a part of that system of adjustments, shipments from Puerto Rico to the mainland can be regulated even if imports of oil into Puerto Rico are in fact completely unrestricted.

> The same tariffs, customs, and duties shall be levied, collected, and paid upon all articles imported into Puerto Rico from ports other than those of the United States which are required by law to be collected upon articles imported into the United States from foreign countries.

We concluded that this specific prohibition limited the President's powers under § 232(b). Similar problems may arise if the President imposes a license fee or "tariff quota" system in which imports can enter free-of-charge up to a certain level but must pay a tariff or fee beyond that level; if the level from which duties are charged is not the same for both the mainland and Puerto Rico, we would have considerable doubt about the ability of the program to survive a challenge in court.[10]

II. The President May Impose Quotas on Shipments of Oil from Puerto Rico to the Mainland as a Necessary Incident of a System of Separate Import Quotas.

Shipments of oil between regions can, of course, nullify any system of regional quotas. Sometimes, market conditions and transportation costs combine to prevent such transshipments. If they do not, however, and if § 232(b) gives the President the power to establish separate regional quotas, then by implication § 232(b) authorizes the President to restrict transshipments directly in order to make the separate regional quotas effective. The Supreme Court is, "in the absence of compelling evidence that such was Congress' intention, unwilling to prohibit administrative action imperative for the achievement of an agency's ultimate purposes. . . . We cannot . . . conclude that Congress has given authority inadequate to achieve with reasonable effectiveness the purposes for which it has acted." *Permian Basin Area Rate Cases,* 390 U.S. 747, 780, 777 (1968). Elsewhere the Court has indicated that unless Congress says otherwise, an agency has power to do that which is "reasonably ancillary to the effective performance of [its] various responsibilities. . . ." *United States* v. *Southwestern Cable Co.,* 392 U.S. 157, 178 (1968). Neither the text nor the legislative history of § 232(b) suggests that Congress intended to withhold from the President all authority to regulate shipments between regions. The President may, then, impose quotas on shipments of oil from Puerto Rico to the mainland if he decides that such quotas are reasonably necessary to enforce the import adjustment scheme he has adopted under § 232(b).[11]

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[10] The Supreme Court recently declined to decide the analogous issue arising under the uniformity of duties clause. *See Federal Energy Administration* v. *Algonquin SNG, Inc.,* 426 U.S. 548, 560 n.11 (1976).

[11] In *Gulf Oil Corp.* v. *Hickel,* 435 F.2d 440 (D.C. Cir. 1970), the United States Court of Appeals for the District of Columbia Circuit tacitly endorsed the President's power to restrict shipments of oil from Puerto Rico to the mainland. In 1968 a presidential proclamation under § 232(b) imposed

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It is not difficult to see why restrictions on transshipments will be necessary if Puerto Rico's quota is unlimited and the mainland's has some significant effect on imports. Nonetheless, it would be advisable for the President to explain his reasoning if and when he adopts such restrictions. Moreover, we wish to emphasize that § 232(b) authorizes only those controls on interstate shipments which are reasonably ancillary to a system of import adjustments adopted under § 232(b). Section 232(b) does not give the President a general power to adjust interstate shipments of oil.

Again, our conclusions apply only to quotas or other quantitative restrictions on shipments from Puerto Rico to the mainland. A tariff or fee would violate § 3 of the Foraker Act, 48 U.S.C. § 738:

> All merchandise and articles coming into the United States from Puerto Rico and coming into Puerto Rico from the United States shall be entered at the several ports of entry free of duty and in no event shall any tariff duties be collected on said merchandise or articles.

See also Dooley v. *United States,* 182 U.S. 222, 233–36 (1901). As we said in connection with § 2 of the Foraker Act, 48 U.S.C. § 739, this specific prohibition limits the President's general § 232(b) powers.

Larry A. Hammond
Acting Assistant Attorney General
Office of Legal Counsel

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separate quotas on oil shipped into the mainland and Puerto Rico. *See* Proclamation No. 3823, 33 Fed. Reg. 1171 (1968), *amending* Proclamation No. 3279, 24 Fed. Reg. 1781 (1959). The Puerto Rican quota was allocated among several producers. Section 3(b)(2) of the proclamation instructed the Secretary of the Interior that if a producer shipped more oil from Puerto Rico to the mainland than that producer had shipped during a certain base year, the producer's allocated share of the Puerto Rican import quota for the next year was to be reduced by an equal amount. The obvious purpose and effect of this provision was to ensure that shipments of oil from Puerto Rico to the mainland would not exceed the base year levels. The District of Columbia Circuit noted that this provision was "in furtherance of the large design of the overall regulatory scheme, to restrict importation of foreign oil into the *continental* United States." *Id.* at 443 (emphasis added). The court proceeded to decide a dispute, arising under this provision, about how to calculate the base year figure. The legality of the restriction on shipments from Puerto Rico to the mainland was apparently not challenged, and the court never questioned it.

Applicability of Criminal Statutes and "Whistleblower" Legislation to Unauthorized Employee Disclosures

Several criminal statutes may be applicable to improper disclosure by a Justice Department employee of information pertaining to Federal Bureau of Investigation (FBI) undercover investigations.

Employees of the FBI are excepted from the general "whistleblower" provisions of the Civil Service Reform Act of 1978; those provisions do not in any event apply where a disclosure is specifically prohibited by law, as is apparently the case here.

February 7, 1980

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

At your request, we have reviewed the criminal statutes to determine whether any might be applicable to Justice Department employees who may be found to have improperly disclosed information pertaining to the ABSCAM investigation.* We have also reviewed the so-called "whistleblower" statutes that were designed to provide a framework for, and protection of, proper disclosures by Departmental employees. Our quick review of these matters suggests that there are several criminal statutes that might have application here and that nothing in the "whistleblower" legislation will provide ground for justifying any leaks that may have occurred here.

I. Criminal Statutes

A. Privacy Act

Under the Privacy Act, 5 U.S.C. § 552a, a willful disclosure of information contained in a system of records by a federal officer or employee who has possession of or access to such records by virtue of his office or employment is punishable as a misdemeanor and subject to a fine of $5,000. 5 U.S.C. § 552a(i). The disclosure must be prohibited by either the Privacy Act or a regulation promulgated thereunder in order for the statute to apply. Since the information that was disclosed was probably contained in Federal Bureau of Investigation (FBI) investigative files, which we are informed are part of the FBI's system of records, and since the disclosure would not be authorized under any of the categories listed in 5 U.S.C. §552a(b), the willful disclosure of such information would be prohibited by 5 U.S.C. §552a(b) and by departmental regulation, 28 C.F.R. 16.56(8).

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* NOTE: The ABSCAM investigation was an undercover investigation by the Federal Bureau of Investigation into allegations of political corruption and bribery, which culminated in the prosecution and conviction of a number of state and federal officials. *See, e.g., United States* v. *Myers*, 692 F.2d 823, 829–30 (2d Cir. 1982). Ed.

B. Theft of Government Property

Under 18 U.S.C. §641, a person who knowingly converts to his own use or the use of another any record or thing of value to the United States, may be imprisoned for 10 years and/or be fined $10,000. Recently, the Government has argued in several cases that §641 applies to unauthorized disclosure of government information because such information is a "thing of value" to the United States. The Second Circuit in *United States* v. *Girard*, 601 F.2d 69 (2d Cir. 1979), accepted the Government's theory and held §641 applicable to the sale by a Drug Enforcement Administration (DEA) employee of information contained in a DEA computer which concerned the identity of possible informers and the status of certain drug investigations. The court rejected the defendants' argument that construing §651 to apply to the theft of information would make the statute vague and overbroad and would thus infringe on First Amendment rights, stating that there was no danger of vagueness or overbreadth there because the defendants must have known that the disclosure of such information was prohibited by DEA regulations. However, a district court in the District of Columbia has expressly rejected the Government's interpretation of §641 on the ground that it would infringe on the First Amendment. *United States* v. *Hubbard*, 474 F. Supp. 64, 79 (D.D.C. 1979). The Third Circuit in *United States* v. *DiGilio*, 538 F.2d 972, 978 (3d Cir. 1976), finding that photocopies of government documents were stolen, made it clear that its decision to affirm the conviction on this ground should not be read to imply a rejection of the Government's theory that §641 applies to theft of government information.

C. Removal of Government Records

If original government records were removed, 18 U.S.C. §2071 would apply, which punishes such removal with 3 years in prison and/or a $2,000 fine. If government records were photocopied on government equipment, and the photocopies were removed, 18 U.S.C. §641 may apply. *United States* v. *DiGilio*, 538 F.2d at 977.

D. Disclosure of Confidential Business Information

Under 18 U.S.C. §1905, it is unlawful for a government employee to disclose information coming to him in the course of his employment which relates to the amount or source of any income, profits, losses, or expenditures of any person or firm. Violation of this statute may be penalized by a year's imprisonment, a $1,000 fine and/or removal from employment. Since the ABSCAM investigation may be viewed as generating information related to the source and amount of income of Members of Congress, § 1905 may apply to the disclosure of such information. We do not know whether § 1905 would be construed that broadly because we have not found any published opinion in which a prosecution was brought under that statute.

E. Civil Rights Statutes

Under 18 U.S.C. § 242, it is a crime for any person, "under color of any law, statute, ordinance, regulation, or custom," willfully to deprive any inhabitant of the United States "of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States." If a person acquires information in his official capacity, and uses his official status to lend credibility to his statements when he discloses that information, his disclosure almost certainly would constitute action "under color of law," even if it is unauthorized.[1] Depending on the particular facts, the disclosure of ABSCAM information may have violated the constitutional rights of targets of the investigation in several ways; if the disclosures were intended to violate these rights, they were willful and therefore a crime.

First, by creating prejudicial publicity, the disclosures may have violated a potential defendant's right to a fair trial. Relatedly, if the disclosures persuaded witnesses with exculpatory testimony not to come forward, they may have violated a potential defendant's rights to compulsory process and due process of law.

Second, an argument can be made that the Constitution prohibits a member of the Executive Branch, acting under color of law, from tortiously undermining the effectiveness of a Member of Congress. The speech or debate clause, the congressional privilege against civil arrest, *see* Art. I, § 6, cl. 1, and the Constitution's strict limits on the circumstances under which a Member can be removed, *see Powell* v. *McCormack*, 395 U.S. 486, 522–48 (1969)—as well as general principles of separation of powers—all suggest that Members of Congress have some constitutional protection against efforts by Executive Branch officials to undermine their effectiveness as representatives. If those efforts take the form of a common law tort committed under color of law—here, perhaps defamation or an invasion of privacy by placing a person in a "false light"—an argument can be made that the Members' constitutional protection has been violated. *Cf. Wheeldin* v. *Wheeler*, 373 U.S. 647, 653–67 (1963) (Brennan, J., dissenting) (malicious abuse of process by a federal official may be actionable as tort under federal common law).

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[1] Depending on the facts, the disclosures might possibly violate 18 U.S.C. § 241, under which it is a crime for "two or more persons [to] conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." Section 241 reaches actions that were not done "under color of law."

Third, the disclosure here may have violated the Fifth Amendment's guarantee that no person be deprived of liberty or property without due process of law. The Privacy Act and its implementing regulations probably give the persons they are designed to protect—here the targets about whom information was disclosed—a statutory entitlement that amounts to a "property" interest within the meaning of the Due Process Clause. Any other statute or regulation that was designed to prevent the prejudicial disclosures of information gained in a criminal investigation would create a similar property interest, whether or not it provided criminal penalties. Reputation itself is probably not a "liberty" interest within the meaning of the Fifth Amendment's Due Process Clause, *see Paul* v. *Davis,* 424 U.S. 693, 701–710 (1976),[2] but an injury to reputation, combined with some additional significant injury, can constitute a deprivation of "liberty" within the meaning of the clause. *See id.* Here, the undermining of the ability of a target to perform his legislative function as a Member of Congress may constitute that additional injury. In these ways, the disclosures here may have deprived persons of their liberty or property without due process, thus—if wilful—violating 18 U.S.C. § 242.

We have also reviewed the obstruction of justice statutes but, given the facts as we presently understand them, we do not find them applicable. 18 U.S.C. § 1503 applies only when a judicial proceeding is pending, and 18 U.S.C. § 1505 applies only when an administrative proceeding is pending. The only obstruction of justice statute applicable to an investigation is 18 U.S.C. § 1510, which is much narrower in scope than §§ 1503 and 1505, punishing an endeavor by bribery, misrepresentation or intimidation to obstruct, delay or prevent the communication of information related to the violation of a criminal statute of the United States. However, if it can be shown that the purpose of the disclosure was to terminate the investigation and that bribery, misrepresentation or intimidation was involved, it could be argued that § 1510 applies.[3]

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[2] *Paul* v. *Davis* held, in a case involving a claim under 42 U.S.C. § 1983, that reputation alone was not a "liberty" interest protected by the Due Process Clause of the Fourteenth Amendment. Since the Court was explicitly concerned about "mak[ing] the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States," 424 U.S. at 701, an argument might be made that this holding does not apply to interests protected against invasion by federal officials.

[3] If the purpose of the disclosure was to intimidate Members of Congress and impair their effectiveness, it could conceivably be argued that 18 U.S.C. § 372 applies. That statute punishes a conspiracy to prevent by force, intimidation, or threat a person holding any office, trust, or place of confidence under the United States from discharging his duties. Such an argument, however, may be founded on an overbroad construction of the term "intimidation."

II. Whistleblower Protection

The Civil Service Reform Act of 1978 protects from agency reprisals employees who disclose information that they "reasonably believe evidences—(i) a violation of any law, rule, or regulation, or (ii) mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law. . . ." 5 U.S.C. § 2302(b)(8)(A). This section covers positions in the competitive service, career appointee positions in the Senior Executive Service, and positions in the excepted services other than those at the policy level and those specifically excluded by the President. 5 U.S.C § 2302(a)(2)(B). It applies generally to all executive agencies, but enumerates exceptions, including the FBI. FBI employees enjoy the more limited protection of 5 U.S.C. § 2303, which prohibits reprisals against FBI employees who disclose information to the Attorney General or his designee.

If the Department decides to take a "personnel action" (defined broadly in 5 U.S.C. § 2302(a)(2)(A)) against an employee for "leaking" information to the press, it must determine whether the employee is covered by the "whistleblower" protections. The head of each agency is responsible for prevention of reprisals prohibited by the Act. 5 U.S.C. § 2302(c).

An employee of the FBI is not protected by the Act from reprisals for disclosure of information to the press. An employee of any other branch of the Department is protected only if: (1) He is not in a position exempted from competitive service because of its confidential, or policymaking character; (2) the disclosure was not specifically prohibited by law; and (3) the employee reasonably believed that the information evidenced violations, abuses, or dangers specified by the Act. Because it is likely that any disclosure would be violative at least of the Privacy Act (if not other statutes), it appears to us that Departmental employees would find no protection in these provisions.

LARRY A. HAMMOND
Acting Assistant Attorney General
Office of Legal Counsel

Payment of Private Counsel Fees Under the Department of Justice Representation Program

Whether fee statements submitted to the government by private counsel retained to represent a government employee may be disclosed to the public without violating applicable ethical standards depends upon the facts of each case.

The government's practice of paying some fees and expenses charged by private counsel but not paying others does not present a substantial ethical question, as long as the practice is clearly understood by the employee-clients and their private attorneys.

February 7, 1980

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

When a government employee is sued personally for something he did or omitted to do in the course of his employment, he can usually turn to the Civil Division for help. The Civil Division will assign one of its own attorneys to defend him, or in some circumstances it may recommend that he retain private counsel at government expense.[1] The conditions under which private counsel may be retained are set forth generally in the so-called "Representation Guidelines." *See* 28 C.F.R. §§ 50.15, 50.16. In the usual case, the precise terms and conditions of any fee agreement between private counsel and the Government are described in a written contract signed by the Assistant Attorney General and the participating firm.

As a matter of billing practice, the Civil Division requires all private attorneys participating in the representation program to submit monthly fee statements to the Civil Division that describe in detail the services for which they seek compensation. The attorneys have complied with this requirement in the way that attorneys usually comply with the demands of an impecunious client who questions a fee: they have furnished the Civil Division with actual time records or other relatively raw and explicit descriptions of how they spent their time.

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[1] In a series of recent opinions rendered at the request of the Civil Division, this Office has discussed the legal basis for the practice of using government attorneys and private attorneys to provide government employees with free legal representation to protect their personal interests in civil litigation. Given the perplexing questions that have been generated by those opinions and the practices they authorize, we express no view, for purposes of this opinion, on the question whether these practices ought to be modified.

Because of the large amount of money that is being paid out in fees under the representation program, the Civil Division has determined that the public has a legitimate interest in knowing how this money is being spent. Accordingly, the Civil Division has made available to the public much of the relevant information. It has disclosed: (1) the identity of each law firm participating in the program; (2) the aggregate amount paid annually to each law firm under the program; and (3) the basic terms of the standard fee arrangement, including the agreed hourly rate. Moreover, despite the objection of some of the participating firms, the Civil Division has given some thought to the possibility of releasing additional information, including the detailed records and descriptions of the services rendered by the participating firms. You have requested our views regarding the ethical aspects of such an undertaking. Is there anything in the Code of Professional Responsibility that would prevent the Civil Division from disclosing information of that sort? [2]

You have asked a second question that involves a related problem. On occasion, the Civil Division declines to pay for some of the services for which firms seek compensation. For example, it will usually decline to pay for services rendered in connection with a counterclaim or ancillary "affirmative" litigation. It may also decline to pay certain extraneous expenses (e.g., "entertainment" expenses). As a matter of policy, the Civil Division has never refused to pay for services rendered in connection with the development of an actual defense that was asserted in litigation, even though the defense may appear in retrospect to have been a waste of time and therefore not "reasonably necessitated by the defense" within the meaning of the fee agreement. But because the decision concerning payment *vel non* may carry some potential for influencing the attorneys in the conduct of their representation, and because the Canons generally require attorneys to exercise independent professional judgment on behalf of their clients without regard to economic or other pressures exerted by third parties, you have asked whether this practice of paying some fees and expenses and not paying others, presents any ethical difficulty.

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[2] Your question assumes that this Department has discretion to withhold this information under the Freedom of Information Act (FOIA). We express no view on that question, except to say in passing that there is probably a rough congruence between the relevant ethical concerns and the relevant FOIA considerations. If there is a solid ethical reason for delaying or denying disclosure in a particular case, an exemption from mandatory disclosure may be available under FOIA.

Likewise, your question assumes that there is no statutory bar to disclosure and that the Civil Division is legally free to disclose this information if it can do so ethically. Because this information relates to financial matters and in some instances may reveal methods of professional operation not ordinarily made public in the course of the attorney-client relationship, some consideration ought to be given to the applicability in this context of 18 U.S.C. § 1905, which bars public disclosure of certain kinds of confidential business information that comes into the hands of government officers by virtue of reports and other submissions from the private sector. The recent decision in *Chrysler* v. *Brown*, 441 U.S. 281 (1979), is obviously relevant here, as will be the position taken by the Government regarding the scope and applicability of § 1905 on the remand in that case. There is very little legislative history relevant to § 1905. We express no firm view regarding its applicability in this context. We should say, however, that in our opinion there is a substantial question whether Congress intended this statute to subject government officers to criminal liability for disclosing to the public the amount of public money expended under government contracts or the nature of the services provided the Government in return.

Our views on both questions are set forth below.

I. The Ethics of Disclosure

The attorneys themselves have suggested that public disclosure of the detailed billing information may violate Canon 4 of the Code. Canon 4 requires all attorneys to preserve the "confidences" and "secrets" of their clients. The attorneys have argued that the fee statements submitted to the Civil Division under the representation program do indeed contain the "confidences" and "secrets" of the employee-defendants and that these "confidences" and "secrets" must be preserved.

We have three observations to make on this point:

First, to the extent, if any, that these billing materials do contain "confidences" or "secrets" within the scope of Canon 4, we think this Department should preserve those confidences or secrets and should not disclose them publicly without the consent of the employees. We recognize that these employees are not the "clients" of this Department. We cannot say that public disclosure of their confidences or secrets by the Civil Division would violate the letter of the relevant disciplinary rules. But we think that disclosure would be inconsistent with the spirit of Canon 4 and with the purposes of the representation program itself. The whole purpose of that program is to provide government employees with legal representation, and one of the essential characteristics of legal representation is that it protects the client's interests by preserving his confidences and secrets. If the Civil Division were representing these people directly, Canon 4 would prevent it from disclosing their confidences or secrets.[3] It seems to us that the practice should be the same when the Civil Division chooses to provide representation indirectly. In both cases the purpose of the exercise is to protect interests of government employees, not to expose their confidences and secrets to the public.[4]

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[3] The general question whether a government lawyer is ever permitted or required by law or the ethics of his profession to disclose embarrassing, detrimental, or incriminating information concerning fellow employees who come for legal advice or professional help is a complex one. There are many different circumstances in which the issue can arise, and the answer can differ from case to case. We think it clear, however, that when an attorney from the Civil Division is assigned to appear as the attorney of record for a government employee who has been sued personally in a civil case, the attorney's duty under the Code (and therefore under departmental regulations) is to preserve the confidences and secrets of the client. *See, e.g.*, Opinion 73-1 of the Professional Ethics Committee, Federal Bar Association, 32 Fed. B. J. 71 (1973); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1413 (1978). That has been the traditional view of this Office.

[4] The basic justification for any discretionary disclosure of the billing information, including disclosure of any actual confidences or secrets, is that disclosure will enable the public to monitor the expenditure of government resources. But government resources are expended when Civil Division attorneys provide representation directly. The only economic difference between direct representation and indirect representation is the difference between paying a salary and paying a fee. It is difficult to see how that difference can permit the preservation of secrets in the one case and require disclosure in the other.

Second, Canon 4 is designed to protect clients, not attorneys. If a client has no objection to a disclosure of billing information, his attorney has no reason to resist disclosure insofar as Canon 4 is concerned. Therein lies a possible solution to your problem. Most of these employees will ultimately have no interest whatever in preserving the confidentiality of the great bulk of the billing information in question here. If they are requested at the proper time to review these documents with an eye to identifying those parts, if any, that record the substance of confidential attorney-client communications or secret matters that would be embarrassing or damaging to their interests if disclosed, they may well be in a position to approve the disclosure of all the rest. We are not suggesting that they be asked to "waive" their right to protect embarrassing confidences or secrets, only that they be asked to review the relevant materials and separate the wheat from the chaff.[5]

The ultimate substantive question, of course, is whether these documents do in fact contain "confidences" or "secrets" falling within the scope of Canon 4. Our reluctant conclusion is that this question cannot be answered categorically. It must be answered on a case-by-case basis after an examination of each document in light of all the facts of each case. We realize that this conclusion is an awkward one from an administrative standpoint, but we see no way around it. We will elaborate briefly.

Canon 4 protects two categories of information against nonconsensual disclosure: (1) information within the scope of the evidentiary privilege for confidential communications between attorney and client (as defined by local law); and (2) a broader category of "secret" information gained by an attorney from whatever source "in the professional relationship," the disclosure of which would be detrimental to, or contrary to the wishes of, the client. Information relevant to the nature and scope of professional services rendered by an attorney for a client does *not* invariably fall into either of these categories; and in our view there are many circumstances in which it may be disclosed for any proper purpose without raising ethical questions. This is frequently true with respect to services of the kind that are of concern to the Civil Division here, i.e., services rendered by attorneys of record in actual litigation. The point is a simple one. During litigation a great deal of information about the client's affairs, the scope of the attorney's employment, and the services rendered by him in the course of the case is disclosed publicly as a matter of course; and much of the undisclosed detail can be revealed, at least by the end of the case, without betraying the substance of any privileged communication and without disclosing any other "secret" that carries real potential for embarrassment to the client.

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[5] Whether at this late date their willingness to undertake such a review in good faith could be made a precondition to final reimbursement of their attorneys is a question that depends entirely on an interpretation of the contracts between the attorneys and the Civil Division. We express no firm view on that question. With respect to future contracts, it may well be that some thought should be given to establishing explicitly, by contract, a review procedure of this kind.

Consider the following example: An attorney is retained to defend a tort case. He spends one hour interviewing the client, one hour preparing and filing an answer to the complaint, two hours researching the applicability of the relevant statute of limitations, 30 minutes preparing a motion for summary judgment, six hours sitting in the courthouse, and 15 minutes arguing and winning the motion. It is possible that all of that information can be disclosed publicly at the end of the case without betraying any privileged communication,[6] and because so much of the relevant information is publicly available anyway, it is extremely unlikely that any other "secrets" relevant to the nature and scope of the services performed would be embarrassing or harmful to the client if disclosed. When the world already knows that the attorney filed a motion for summary judgment on the client's behalf, it does not hurt or embarrass the client for the world to learn that the attorney spent 30 minutes preparing that motion.

On the other hand, it is clear that information protected by Canon 4 can find its way into billing records. The classic example is the diary entry that records the substance of a confidential communication: "Ten-minute conference with client concerning possible divorce " More frequently, a billing record may contain a description of actions taken by the attorney on the client's behalf that should remain "secret" if the client's interests are to be served. For example, if a defense attorney records in his diary that he has just spent two hours researching and preparing a motion to dismiss the complaint for insufficiency of process, that information should not be disclosed to the other side prior to the filing of the motion, since premature disclosure would deprive the client of a legitimate tactical advantage in the litigation. We think it would be not only unprofessional but also unethical for an attorney to make a premature disclosure of that sort, absent some adequate justification. The disclosure would trench on Canon 4 and on Canons 6 and 7 as well.[7]

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[6] The attorney-client privilege protects the confidentiality of information obtained by the attorney from confidential communications with his client. Generally speaking, it does not protect information obtained from other sources. Information about the nature of the services rendered by an attorney for a client is generated by the attorney himself. He does not obtain it from his client, and he can often disclose it without betraying the substance of anything his client told him. That is the reason for the traditional view that an attorney can "usually" or "ordinarily" disclose the nature of the services he performs for his client (*e.g.*, 5 hours deposing plaintiff, 20 hours preparing for trial) without disclosing anything protected by the privilege. *See, e.g.*, *Behrens* v. *Hironimus*, 170 F.2d 627, 628 (4th Cir. 1948); 2 Louisell & Mueller, Federal Evidence 540–41 (1978).

Moreover, the fact that the attorney may at some later date communicate information concerning the nature of his services to his client (in a bill, for example) does not make the information itself privileged. The modern view is that the privilege extends to confidential communications from attorney to client, just as it extends to confidential communications from client to attorney; but the privilege protects the confidentiality of *communications*, not facts themselves. If an attorney believes that the sky is blue and advises his client to that effect, the privilege prevents him from betraying his advice, but it does not prevent him from giving the same advice—communicating the same fact—to the world at large. If the fact in the mind of the attorney is accessible to examination and disclosure before its communication to the client, it remains accessible afterwards, though of course there can be no demand for disclosure of the communication itself. *See* 2 Louisell & Mueller, Federal Evidence 540 (1978).

The traditional interpretation of the ethical duty of an attorney to preserve the confidences of his client was tied to this concept of privilege. Thus it was thought that an attorney could ethically disclose the nature of services rendered for a client, since that information is not acquired by the attorney from a confidential communication with the client and may be otherwise accessible to examination and disclosure without betraying anything that passed between attorney and client. ABA Comm. on Professional Ethics and Grievances, Formal Op. 154 (1936). This view of the ethical obligation does not, of course, take into account the expanded scope of the disciplinary rules, which protect, not only confidential communications, but "secrets" obtained from any source in the professional relationship.

We can summarize our views on the question of disclosure in the following way. It is unlikely that very much of this billing information discloses the substance of privileged communications or any other "secrets" that would be embarrassing or detrimental to any of these employees if disclosed, but the ethical and policy questions that would be presented by a disclosure of any given document cannot be answered without examining that document and determining whether in fact it contains confidential or secret matter protected by the Canon. The administrative difficulty of attempting to make that sort of determination in each case is obvious, and it is compounded by the fact that the determination probably cannot be made prudently without consultation with the attorney and the employee whose interests are at stake. There is no litmus test. The significance of a billing document to a client depends on what the client's interests are and on all the other facts and circumstances of the case. The unfortunate truth is that he and his attorney are the ones who understand those interests and those facts best.

This brings us to the suggestion that we have already made. At the end of each of these cases the Civil Division will be in a position to submit all the relevant billing records to the employee-client and to request that he determine whether, in the light of: (1) the disposition of the case; and (2) any liabilities or embarrassments that may yet be his, the records reveal anything that would be detrimental to his interests if disclosed. The objectionable parts can be redacted. The rest can be disclosed without provoking ethical concerns.[8]

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[7] Loss of advantage in the litigation in which services are rendered is not of course the only sort of harm that can result from untimely disclosure of professional services. For example, if a corporate client is subject to regulation by an agency before which an attorney practices, the very fact that the attorney has been retained by the client and has performed services for the client could, if known to the agency, direct the agency's attention to the client's affairs, causing expense and inconvenience; and there may be circumstances in which the attorney could not ethically disclose information of that sort without adequate justification. *See* Opinion No. 58, Committee on Legal Ethics, District of Columbia Bar.

[8] In registering their objection to disclosure of these materials, the attorneys have made at least three arguments not discussed in the preceding paragraphs. None of these arguments alters our view of the ethical question or affects our advice to you.

(1) Some of the attorneys have argued that these billing materials, being inter-attorney communications relevant to litigation in which the United States has an interest, are within the traditional rule that extends the attorney-client privilege to communications between two or more attorneys who confer to promote the common interests of their clients. That argument does not wash. Even if one were willing to assume that these attorneys are somehow representing their clients (not themselves)

Continued

II. Paying Some Fees and Expenses but Not Others

We think that the practice of paying some fees and expenses but not others presents no substantial ethical question. We are assuming of course that in all of these cases the clients as well as their attorneys, after full disclosure of the Department's potentially conflicting interest, were made to understand what is stated explicitly in the fee contract itself: (1) that the clients and their attorneys are entirely free to determine what sort of legal services ought to be performed on the client's behalf; (2) that this Department will pay for some of those services, but it may not pay for others; and (3) that if a client wants his attorney to render legal services for which the Department will not pay, he and his attorney must reach their own understanding regarding the fee, if any, that the attorney will charge. As long as all of these points are understood by the parties in interest, the fee arrangement is not unethical, in our view.

A close analogy to this sort of arrangement can be found in the private sector. It is quite common for liability insurance carriers to agree to pay for legal services reasonably necessitated by the defense of claims against their policyholders, even though the interest of the carrier and the interests of the policyholder are rarely identical. Moreover, it is usually made quite clear that the carrier will pay for some kinds of services, but not others (e.g., the carrier usually will not pay for services rendered in connection with a counterclaim). For both of

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when they submit these billing materials to the Civil Division, one would be hard put to conclude that these communications are for the purpose of promoting any "common interest" as between their clients and the United States within the meaning of the rule. It may be true that the United States has a general interest in providing legal representation for its employees, just as it has an interest in paying their salaries and in doing other things that encourage people to enter government service. But a demand for payment of a fee (whether made directly or through an attorney) is a classic "adversarial" demand. It does no more to promote a "common interest" as between the Government and a government employee than would, say, a demand for back salary. That it may be communicated to attorneys in the Civil Division while other attorneys in the Civil Division are representing the United States in the litigation out of which the demand arises is simply a commentary on the peculiar way the Government is forced to do business in these cases. That fact does not, in our view, enhance (or diminish) the privileged status of what these materials contain.

(2) Some of the attorneys have argued that these materials are "attorney work product." There is authority that information contained in law firm statements may indeed, in proper circumstances, be regarded as "attorney work product" and therefore privileged, at least for FOIA purposes. *See Indian Law Resource Center* v. *Department of Interior*, 477 F. Supp. 144 (D.D.C. 1979). But our view of the present case is that "work-product" status of these billing materials (if any) has no direct bearing on the ethical question of discretionary disclosure. Whether or not this information was generated "in anticipation of litigation or for trial," whether or not it reflects the "mental impressions," etc. of these attorneys, the ethical question is simply whether it discloses the confidences or secrets of the clients within the meaning of the Canon. That question turns upon the considerations discussed above. It does not turn upon Rule 26 of the Federal Rules of Civil Procedure.

(3) Finally, some of the attorneys have argued that discretionary disclosure of these materials is prohibited by the Privacy Act. We have conferred with the Office of Information Law and Policy (OILP) on this question. They have expressed doubt that these records, which are filed and retrieved by the name of the law firm that submitted them, constitute a "system of records" within the meaning of the Act. *See* 5 U.S.C. § 552a(a)(5). Moreover, believing that there may be only a very slender basis for claiming a FOIA exemption for disclosure of properly redacted billing materials at the end of each case, OILP is inclined to the view that the Privacy Act is probably irrelevant anyway. It does not, of course, forbid any disclosure that is mandated by FOIA. *See* 5 U.S.C. § 552a(b)(2).

these reasons, the tripartite fee arrangement harbors some potential for abuse, and it does in fact give rise to unethical conduct from time to time. But the traditional view has been that such an arrangement is not unethical in itself and that abuse can be avoided by firmly maintaining the principles that: (1) the attorney has the responsibility for acting solely in the interests of his client, notwithstanding the interests of the company that pays his fee, *see* EC 5-23; and (2) the client must be free, and must be made to understand that he is free, to make other arrangements, either with that attorney or with other attorneys, if it appears that services in addition to those paid by the company are necessary or desirable from his standpoint. *Cf.* DR 5-105(C).

We do have one suggestion regarding a technical point. The standard contract that the Civil Division uses in the representation program is bilateral in form. It is a contract through which the Department of Justice "retains" a private attorney to represent a government employee. It seems to us it would be helpful, both from the standpoint of the disclosure problem and from the standpoint of preserving the independence of private counsel, if this contract could be recast. Unless there is some reason to exclude the employee,[9] he ought to be made a party; and the contract could then provide: (1) that he, the employee, has asked a private attorney to represent him, inasmuch as the Department, for professional reasons, cannot; (2) that he and his attorney will determine what sort of legal services need to be performed on his behalf; (3) that he and his attorney have entered into a collateral agreement with this Department regarding payment of some, but perhaps not all, of the fees generated during the course of this representation; (4) that if the employee and his attorney feel that services are desirable for which the Department will not pay, they must make their own arrangement regarding the fee; and (5) that he has entered into an agreement with this Department regarding the handling of his confidences and secrets and the disclosure of billing information submitted to this Department by his attorney. Much of this is in the agreement already, but it seems to us that if the employee were inserted formally, it would be relatively easy to spell out the precise nature of the rights and obligations of all three parties and to deal directly with the sorts of questions that have prompted your ethical concerns.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

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[9] We have reviewed past Office of Legal Counsel opinions on the question of the authority of the Department to contract with private attorneys to provide legal representation for government employees. We are unaware of any legal consideration that requires the exclusion of the employee.

Management of Admiralty Island and Misty Fiords National Monuments

Executive Order No. 6166 leaves intact forest reservations on national monument lands, and the Department of Agriculture and the Department of the Interior thus share administrative responsibility for Admiralty Island and Misty Fiords National Monuments. Conclusion of opinion of February 9, 1979 (3 Op. O.L.C. 85 (1979)), that management functions in connection with the two national monuments must be transferred from the Department of Agriculture to the Department of the Interior, reconsidered and amended.

February 8, 1980

MEMORANDUM OPINION FOR THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

This is to advise you that, at the request of the General Counsel to the U.S. Department of Agriculture (USDA), we have reconsidered and are amending, as follows, our February 9, 1979, memorandum to you concerning the "Management of Admiralty Island and Misty Fiords National Monuments." [3 Op. O.L.C. 85 (1979)]. We concluded in that opinion that §2 of Executive Order No. 6166, 5 U.S.C. §901 note (1976), required a transfer of management functions from the Forest Service in USDA to the National Park Service in the Department of the Interior with respect to two national monuments created in December 1978, on national forest lands. As explained below, we have subsequently concluded that both USDA and Interior have legal authority to manage the lands in question.

I. Background to the February 9, 1979, Opinion

The President, on December 1, 1978, exercised his powers under §2 of the Antiquities Act of 1906, 16 U.S.C. §431 (1976), to create national monuments at Admiralty Island and Misty Fiords, Alaska. Pres. Proc. Nos. 4611 & 4623, 43 Fed. Reg. 57,009, 57,087 (1978). Included within these monuments were approximately 3.4 million acres of federal land that had been reserved as part of Tongass National Forest in 1907 or 1909. 35 Stat. (Pt. 2) 2152, 2226. On November 30, 1978, your General Counsel's office inquired orally of this Office whether the placement of a monument reservation on these national forest lands required the transfer of the management of the lands to the Department of the

Interior under Executive Order No. 6166, issued in 1933. Section 2 of that order provides:

> All functions of administration of . . . national monuments . . . are consolidated in the National Park Service in the Department of the Interior . . .; except that where deemed desirable there may be excluded from this provision any public building or reservation which is chiefly employed as a facility in the work of a particular agency.

In response to your inquiry, on December 1, 1978, we solicited views on this question from Interior and USDA. Interior chose to express no view. USDA forwarded its opinion to us that §2 of Executive Order No. 6166 would have expunged the forest status of Misty Fiords and Admiralty Island—thus requiring a transfer of management functions from USDA to Interior—but for §9 of the National Forest Management Act of 1976, 16 U.S.C. §1609 (1976), which, in its view, *pro tanto* repealed the executive order and required the management of national forest land to remain in the Forest Service until removed by Act of Congress. In essence, our February 9, 1979, opinion treated USDA's analysis as the sole issue in dispute, and concluded, contrary to its view, that §9 of the National Forest Management Act had no effect on the operation of the executive order. We consequently informed you that, absent some legislative action, the management of these monuments had to be tranferred from the USDA to Interior.

II. Reconsideration

On September 12, 1979, USDA's General Counsel forwarded certain materials to us suggesting the appropriateness of reconsidering our February 9, 1979, opinion. Although, in prior conversations, the General Counsel had indicated that he did not wish to challenge our conclusions on the relationship of the Forest Management Act to Executive Order No. 6166, he questioned the premise, implicit in our opinion and in his own Department's earlier view, that Executive Order No. 6166 operated to expunge the national forest status of Admiralty Island and Misty Fiords. In his view, such status, at least with respect to monuments created on forest lands after 1933, could be expunged solely by the express exercise of authority under 16 U.S.C. §473, which permits the President to revoke or modify prior presidential actions creating national forests, such as Tongass National Forest, out of unreserved public lands. He urged that the effect of the executive order was only to vest additional management responsibilities in the Department of the Interior for national monuments created on forest lands, thus permitting the two departments to share administrative responsibility for Admiralty Island and Misty Fiords.

We have concluded that USDA's General Counsel has correctly interpreted the 1933 order. The purpose of Executive Order No. 6166 was to effect economies in government by facilitating the consolidation of similar functions under single government authorities. With respect to national monuments, it consolidated management functions in the National Park Service of the Department of the Interior. Its subject matter, however, does not include the status of reservations attaching to national monument lands. It does not expressly expunge nonmonument reservations on national monument lands, and no expungement appears by implication. The executive order is fully effective so long as it is interpreted to make possible National Park Service management of forest lands that are national monuments, which itself does not require the elimination of forest status.

The conclusion that Executive Order No. 6166 leaves forest reservations on national monument lands intact is buttressed by the existence, since 1897, of express statutory authority permitting the President to expunge the forest status of forest lands removed previously by the President from unreserved public lands. 16 U.S.C. § 473 (1976). Nothing in the executive order suggests that it is to be viewed as an alternative or even an additional means of terminating the forest status of national forests. Indeed, the order's limited organizational function is inconsistent with the notion that it confers additional substantive authorities with respect to public lands. In cases of national monuments created on national forest lands since 1933, the President has consistently exercised his authority under 16 U.S.C. § 473 to revoke or modify the forest status of lands he wished to be treated as having only national monument status. *See, e.g.,* Pres. Procs. Nos. 2330, and 2339, 53 Stat. (Pt. 3) 2534, 2544 (1939). This practice implies a continuing administrative interpretation that Executive Order No. 6166 does not itself automatically terminate the national forest status of monuments created on national forest lands.

On November 17, 1972, USDA and Interior entered into an agreement, concluding that Executive Order No. 6166, as amended, expunged the dual status of monuments created on forest lands prior to 1933.[1] In essence, the departments agreed to follow a 1933 opinion of the Solicitor of the Department of the Interior, holding that, in the absence of a timely interdepartmental agreement to the contrary, the management of pre-1933 monuments on forest lands was transferred automatically to Interior by Executive Order No. 6166. We have not been asked to consider this opinion or the 1972 agreement, and express no view as to their conclusions. We note, however, that such a determination as to pre-1933 monuments, which did not construe the effect of the executive order on the status of reservations attaching to national monument lands, does not preclude a case-by-case administrative decision as to the proper management of post-1933 national monuments to the extent permitted by the executive order and any other applicable statutory authorities. Executive Order No. 6166 creates management authority in the National Park Service with respect to national monuments even if created on forest lands; whether that authority is exclusive, additional, delegable, or forfeitable depends on the terms of the order and other authorities that may exist with respect to the lands.

III. Management Options

Because the President, in creating Admiralty Island and Misty Fiords National Monuments, did not terminate the national forest status of those lands, the National Park Service, under Executive Order No. 6166, and the Forest Service, under its statutory authorities, 16 U.S.C. § 551 *et seq.*, are both authorized to participate in the management of these monuments. Both, we have been advised, have appropriations that may be applied to this purpose.

On January 15, 1980, representatives of this Department met with representatives of USDA and Interior, to discuss the future management of Admiralty Island and Misty Fiords. The USDA and Interior representatives agreed that the Forest Service and the National Park Service would enter into a memorandum of understanding to govern the management of these monuments, accounting for the land use standards binding on the departments and specifying each department's regulatory and budgetary responsibilities. We have concluded that this is a permissible option for structuring the management responsibilities of the two departments. *Cf.* 16 U.S.C. § 2 (1976), permitting the Secretary of Agriculture to cooperate with the National Park Service, to the extent requested by the Secretary of the Interior, in the supervision, management, and control of national monuments contiguous to national forests.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

Authority of National Telecommunications and Information Administration to Monitor Radio Communications

The National Telecommunications and Information Administration (NTIA) may monitor radio communications to the extent reasonably necessary to discharge its functions under 47 U.S.C. § 305(a) and 15 U.S.C. § 272(12) & (13).

Title III of the Omnibus Crime Control and Safe Streets Act of 1963 prohibits NTIA from aurally monitoring communications between a radio and a land-line telephone.

February 12, 1980

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF COMMERCE

This responds to your request for our views on the authority of the National Telecommunications and Information Administration (NTIA) to monitor certain radio transmissions. You specify that NTIA will monitor these communications only to the extent necessary to perform its authorized functions, and that it will not divulge the contents or the existence of any particular intercepted message. Similarly, you say, NTIA will not attempt to decode coded messages.

For the reasons we state below, we believe that, with one exception, NTIA may conduct these monitoring activities to the extent they are reasonably necessary to discharge NTIA's statutory functions under 47 U.S.C. § 305(a) and 15 U.S.C. § 272(12) & (13). The one exception is that NTIA may not aurally monitor communications between a radio and a land-line telephone.

I. NTIA Authority to Monitor Radio Communications

NTIA derives its authority from the Secretary of Commerce. No statute explicitly empowers the Secretary to monitor radio communications, but we believe that two statutes implicitly authorize the Secretary to monitor in certain situations. First, § 305(a) of the Communications Act of 1934, 47 U.S.C. § 305(a), provides that "[r]adio stations belonging to and operated by the United States . . . shall use such frequencies as shall be assigned . . . by the President." As you know, when the function of assigning frequencies to government stations was vested in the Office of Telecommunications Policy (OTP), *see* Reorganization Plan No. 1 of 1970, 84 Stat. 2083, we expressed the opinion that OTP was "implicitly authorized to conduct monitoring activities related to its statutory responsibilities under § 305(a)." We reasoned that OTP's functions were analogous to those of the Federal Communications Commission, which assigns frequencies to radio stations not owned by the government and regulates certain aspects of their transmissions. *United States* v. *Sugden*, 226 F.2d 281, 284 (9th Cir. 1955), *aff'd per curiam*, 351 U.S. 916 (1956), held that the Commission can monitor radio communications in order to carry out its duty of assigning frequencies, because "[e]xcept by listening, how can the Commission tell with certainty that a station is using its assigned frequency?" *Id*. By analogy, we concluded, OTP was authorized to monitor radio transmissions in the course of performing its function of assigning frequencies to stations owned by the government. In 1977, this function was transferred to the Secretary of Commerce. Reorganization Plan No. 1 of 1977, as amended, § 5(B), 91 Stat. 1633. You tell us that the Secretary has delegated this responsibility to NTIA. Plainly, then, NTIA has the same authority as OTP had to monitor radio communications to the extent reasonably necessary to carry out its statutory responsibilities under § 305(a).

The second statutory source of NTIA's authority to monitor is 15 U.S.C. § 272(12) & (13). These subsections provide:

> The Secretary of Commerce . . . is authorized to undertake . . .
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> * * * * *
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> (12) the investigation of the conditions which affect the transmission of radio waves from their source to a receiver;
>
> (13) the compilation and distribution of information on such transmission of radio waves as a basis for choice of frequencies to be used in radio operations.

You tell us that the Secretary of Commerce has also delegated these functions to NTIA. We believe that the reasoning of *Sugden* applies here as well; to the extent that the monitoring you describe is "reasonably ancillary to the effective performance of [these statutory] responsibilities," *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 178 (1968), we believe that NTIA is implicitly authorized to conduct it. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 777, 780 (1968).

Your letter appears to assume that Executive Order No. 12046 confers on NTIA additional authority to monitor radio communications. That executive order does not purport expressly to authorize the Secretary of Commerce to monitor. Your letter seems to suggest, however, that such authority is implicit in the executive order's instruction that the Secretary "serve as the President's principal adviser on telecommunications policies," § 2-401, conduct economic and technical analyses of telecommunications policies, § 2-412, represent the Executive

Branch in dealings with the Federal Communications Commission, § 2-407, and perform similar tasks. But as a general matter,[1] an executive order cannot enlarge the power of the Executive Branch beyond what Congress has granted. *See, e.g., Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 585 (1952). Therefore Executive Order No. 12046 does not expand NTIA's power to monitor beyond what can reasonably be inferred from 47 U.S.C. § 305(a) and 15 U.S.C. § 272(12) & (13).[2]

Partly because your letter assumed that Executive Order No. 12046 provides an independent source of authority to monitor, you did not make clear the extent to which NTIA needs to conduct the sorts of monitoring activities your letter describes in order to fulfill its statutory responsibilities. Thus we cannot specify which among the kinds of transmissions you mention in your letter may be monitored. In general, we believe that NTIA has authority to monitor both electrical impulses and voices on nongovernment frequencies; but it may monitor them only to the extent that such monitoring is reasonably necessary to enable NTIA to assign frequencies to government stations, and to perform the functions incident to assigning frequencies, or to investigate the conditions affecting the transmission of radio waves and to compile and distribute information about radio waves "as a basis for choice of frequencies to be used in radio operations." This authority is, of course, subject to the statutory restrictions to which we turn next.

II. Statutory Limits on NTIA's Authority to Monitor

At first glance, two statutes appear to restrict NTIA's authority. Section 605 of the Communications Act of 1934, 47 U.S.C. § 605, provides, in relevant part, that "[n]o person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person." The Department of Justice has consistently taken the position that since § 605 is phrased in the conjunctive—"intercept . . . *and* divulge" (emphasis added)—a government agency may intercept radio communications so long as it does not disclose information about them to any person outside the Government. *See* Office of Legal Counsel Memorandum for the Director, Federal Bureau of Investigation, May 29, 1979, 3 Op. O.L.C. 240, 245 (1979) (hereinafter "1979 OLC Memorandum") H.R. Rep. No. 1283, Pt. 1, 95th Cong., 2d Sess. 15 (1978). *See also United States* v. *Butenko*, 494 F.2d 593, 623–24 (3rd Cir.) (Aldisert, J., concurring and dissenting), *cert. denied*, 419 U.S. 881 (1974). Moreover, as the language of § 605 suggests, only divulging the contents or existence of a particular "communication" is prohibited. In our view, NTIA would not violate § 605 if, after monitoring, it divulged only aggregate statistics about the use of radio frequencies. You stipulate that you will not reveal the contents of communications to any other party; so long as "contents" is understood broadly to include the "existence" and "purport, effect, or meaning" of the particular communication, we believe that NTIA's monitoring will not run afoul of 47 U.S.C. § 605.

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[1] No inherent presidential powers, derived directly from the Constitution, appear to be involved in NTIA monitoring. *See generally United States* v. *United States District Court*, 407 U.S. 297, 308–12 (1972); Fleishman & Aufses, *Law and Orders: The Problem of Presidential Legislation*, 40 Law & Contemp. Probs., Summer 1976, at 1, 11–13. In any event, as we noted, Executive Order No. 12046 does not expressly attempt to authorize the Secretary of Commerce to monitor, and we are reluctant to assume that inherent executive powers have been invoked by implication.

[2] As you note, Executive Order No. 11556 assigned to OTP many functions similar to those assigned to the Secretary in Executive Order No. 12046, and § 5(B) of Reorganization Plan No. 1 of 1977 transferred "[a]ll . . . functions of the Office of Telecommunications Policy and of its Director," with exceptions not relevant here, to the Secretary of Commerce. But for the reasons we have given, Executive Order No. 11556 could not have expanded OTP's powers beyond what was granted by statute, and in any event a reorganization "may not have the effect of . . . authorizing an agency to exercise a function which is not expressly authorized by law at the time the plan is transmitted to Congress." 5 U.S.C. § 905(a)(4). Thus Reorganization Plan No. 1 of 1977 does not give NTIA any additional statutory authority.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. §§ 2510–2520, presents a more complex question. It provides that with certain exceptions, "any person who . . . willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire or oral communication . . . shall be fined not more than $10,000 or imprisoned not more than five years, or both." 18 U.S.C. § 2511(1)(a). A "wire communication" is defined as:

> any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications.

18 U.S.C. § 2510(1). An oral communication is defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2). Radios contain wires, but the wires are not "connection[s] between the point of origin and the point of reception furnished or operated by . . . a common carrier." For this reason, we have previously expressed the view that communications between two radios are not "wire communications" within the meaning of Title III. 1979 OLC Memorandum, 3 Op. O.L.C. at 242. The Ninth Circuit has reached the same conclusion. *United States* v. *Hall*, 488 F.2d 193, 196–97 (9th Cir. 1973).

On the basis of the legislative history of Title III, *see e.g.*, S. Rep. No. 1097, 90th Cong., 2d Sess. 66, 75, 89–90 (1968); *see also United States* v. *Hall*, 488 F.2d at 198, we have previously concluded, 1979 OLC Memorandum, 3 Op. O.L.C. at 242 & n.2, that when Congress limited the definition of "oral communication" to communications by a person who has "an expectation that such communication is not subject to interception under circumstances justifying such expectation," it intended to include only those communications made with a "reasonable expectation of privacy" in the sense in which that term is used in defining a "search" under the Fourth Amendment, *see, e.g., Katz* v. *United States,* 389 U.S. 347, 351–53 (1967). *See also United States* v. *United States District Court,* 407 U.S. 297, 302 (1972). 1979 OLC Memorandum, 3 Op. O.L.C. at 242 & n.2. We have also previously concluded that radio users have no reasonable expectation of privacy in ordinary radio transmissions. We reasoned that the "ease of interception, the widespread availability of the technology required for interception, and the ease of access for the user to more private means of communication" all suggested that one cannot reasonably expect ordinary radio communications to remain private. *Id.* at 243.[3]

It follows from these conclusions we have previously reached that ordinary communications by radio are not "oral communications" within the meaning of Title III.[4] As we have said, communications between radios are also not "wire communications." Thus Title III, like § 605, does not prohibit NTIA from intercepting ordinary communications between radios. We know of no other statute that applies.

Title III does, however, prohibit NTIA from monitoring communications between a party using a mobile telephone or other radio and a party using a land-line telephone. "Wire communication" is defined by Title III as "any communication made *in whole or in part* . . . by the aid of" wire or cable facilities furnished or operated by a common carrier. 18 U.S.C. § 2510(1) (emphasis added). In the legislative history, Congress noted that this definition is intended to be "comprehensive." S. Rep. No. 1097, 90th Cong., 2d Sess. 89 (1968). Otherwise, the legislative history seems to give no indication of how Congress wished to treat communications between a radio telephone and a land-line telephone. In these circumstances, we must follow the language of the statutory definition; since communications betweeen a radio telephone and a land-line telephone are made "in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection . . . furnished or operated by . . . a common carrier," we must conclude that they are "wire communications" under Title III. The Ninth Circuit, apparently the only court to have considered the issue, reached the same conclusion. *United States* v. *Hall,* 488 F.2d at 197–98. Title III prohibits "any person" from "intercept[ing]" wire communications without a warrant; it contains some exceptions, but none applies to NTIA.[5] As you know, we have previously said that monitoring electrical impulses alone—without translating them to voice impulses—does not violate Title III. Therefore Title III does not prohibit NTIA from monitoring the electronic impulses of communications between radios and land-line telephones. But NTIA may not aurally monitor a transmission if any party to the transmission is using a land-line telephone. With this restriction, we believe that NTIA is authorized to monitor radio communications in the categories you identify in your letter, when such monitoring is reasonably necessary if NTIA is to perform its functions under 47 U.S.C. § 305(a) and 15 U.S.C. § 272(12) & (13).

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[3] As the quoted language suggests, we assume that NTIA proposes to intercept only ordinary radio transmissions, not transmissions made by sophisticated means designed to prevent the transmission from being intercepted by devices that are generally known to exist.

[4] Since radio users have no reasonable expectation of privacy in ordinary radio transmissions, intercepting such transmissions would not violate the Fourth Amendment.

Larry A. Hammond
Deputy Assistant Attorney General
Office of Legal Counsel

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[5] The statute partially exempts "an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission" from these prohibitions. 18 U.S.C. § 2511(2)(b). As you know, we previously concluded that this exemption did not embrace employees of NTIA's predecessor, OTP. We reasoned that when Congress enacted the Omnibus Crime Control Act, it was aware that certain agencies had responsibility for government communications corresponding to the Federal Communications Commission's responsibilities for private communications; yet Congress exempted only the Commission from Title III. We noted that the case law confirmed this view. *See, e.g., United States* v. *Sugden,* 226 F.2d 281, 285 (9th Cir. 1955), *aff'd per curiam,* 351 U.S. 916 (1956). For these same reasons, NTIA is not exempted from the restrictions contained in Title III. No other exemptions are relevant.

Seizure of Foreign Ships on the High Seas Pursuant to Special Arrangements

The United States has authority under international law to enter into agreements to stop, search, and detain foreign vessels on the high seas that are suspected of trafficking in illicit drugs.

The United States may limit its jurisdiction over a foreign flag vessel seized on the high seas, and the vessel may be returned to the flag state at its request without compliance with domestic forfeiture law.

Where the United States is authorized under international law to exercise its police powers to detain ships on behalf of their flag state, such detention does not constitute a taking under the Fifth Amendment. However, where a ship is seized concurrently on behalf of the United States for violation of U.S. customs laws, a claimant is entitled to a prompt adjudication of his rights in the seized property.

February 19, 1980

MEMORANDUM OPINION FOR THE DEPUTY LEGAL ADVISER, DEPARTMENT OF STATE

This responds to your inquiry whether there would be any legal objection to the boarding, search, detention, bringing to a U.S. port and release to the flag state of a foreign vessel believed to be engaged in trafficking in illicit drugs by U.S. authorities pursuant to an agreement with that flag state to act on its behalf.[1] You attached a "Draft Note" that would be the model for such agreements. You also asked more specifically: (1) whether such a seizure would be a taking under the Fifth Amendment; (2) whether due process would require a hearing before the vessel was returned to the flag state; and (3) whether there would be any legal consequences if the United States held the vessel for a prolonged period without instituting condemnation or forfeiture proceedings. We have concluded that your Draft Note would allow the proper exercise by the U.S. of jurisdiction over foreign vessels on the high seas if we have the flag state's permission. However, we believe that it will also permit assertion of concurrent jurisdiction by United States courts. The parties must decide which country will prosecute before the vessel is seized. Unless the vessel is clearly seized in the name of the flag state, the mandatory forfeiture proceedings required by our customs law provide a forum for third-party claims against the vessel. *See, e.g.*, 19 U.S.C. §§ 1602–1604 (1976); 49 U.S.C. §§ 781–782 (1976); 21 U.S.C. § 881(d), (f) (1976).

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[1] We do not, except where indicated, address questions arising from efforts to enforce our domestic law.

I. Authority of the United States to Enter into Special Arrangements to Stop and Search a Foreign Vessel on the High Seas

Flag states have continuing jurisdiction over their vessels on the high seas. This is a basic principle of international law, I Oppenheim, International Law § 264 (7th ed. 1948), which was recognized most recently in Article 6 of the Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2313, T.I.A.S. No. 5200. Although traditionally international law has precluded assertion of jurisdiction on the high seas over a vessel registered to another state, there are exceptions, usually found in treaties, to this rule.[2] Such agreements come within a special category of pacts in which countries grant or waive jurisdiction over crimes that occur in their territory. More familiar examples of such pacts are jurisdictional agreements regarding military personnel. *See Wilson* v. *Girard*, 354 U.S. 524 (1957) (United States and Japan); *Holmes* v. *Laird*, 459 F.2d 1211, 1216 n.32 (D.C. Cir. 1972); *Williams* v. *Rogers*, 449 F.2d 513 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972); Agreement Between the Parties To the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846 (NATO SOFA).

The President has Congress' express authority to enter into special arrangements, including those that will aid the United States' effort to curtail drug traffic. Article 35 of the Single Convention on Narcotic Drugs, 1961, 18 U.S.T. 1408, T.I.A.S. No. 6298 (Single Convention), which was ratified by the Senate in 1967, requires that signatories:

> (a) Make arrangements at the national level for co-ordination of preventive and repressive action against the illicit traffic; . . .
>
> (b) Assist each other in the campaign against the illicit traffic in narcotic drugs;

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[2] During Prohibition, for example, the United States and England signed the Convention between the United States and Great Britain for prevention of smuggling of intoxicating liquors, 43 Stat. 1761. American ships were allowed to "search a private [English] ship within a certain distance outside American territorial waters, and if there were reasonable cause for doing so, might take it in for adjudication by the American courts." J. Brierly, The Law of Nations 240 (5th ed. 1956). Virtually identical treaties were signed with a number of other nations. *Id.* The North Sea Fisheries Convention of 1852 "gave the signatory states rights of search over one another's fishing vessels, but the adjudication of offenses against the fishing regulations was reserved for the state of an offending vessel." *Id. See* J. Starke, An Introduction to International Law 235–36 (5th ed. 1963) (1887 Convention respecting the Liquor Traffic in the North Sea; Interim Convention of Feb. 9, 1957 for the Conservation of North Pacific Fur Seal Herds).

A more dramatic example of assertion of jurisdiction on the high seas is the Intervention on the High Seas Act, 33 U.S.C. §§ 1471 *et seq.*, designed to implement the International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties, Apr. 29, 1958, 26 U.S.T. 765, T.I.A.S. No. 8068. The Secretary of the Treasury is authorized to intervene during an oil spill to mitigate damages by whatever steps are necessary, including destruction of the ship that is leaking oil.

> (c) Co-operate closely with each other and with the competent international organizations of which they are members with a view to maintaining a co-ordinated campaign against the illicit traffic; . . .

Article 28 provides: "The Parties shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant." [3] In a further effort to promote international cooperation in the control of narcotics, Congress has given the President broad powers to negotiate agreements in this area.

> It is the sense of the Congress that effective international cooperation is necessary to put an end to the illicit production, smuggling, trafficking in, and abuse of dangerous drugs. In order to promote such cooperation, the President is authorized to conclude agreements with other countries to facilitate control of the . . . transportation, and distribution . . . controlled substances. . . . Notwithstanding any other provision of law, the President is authorized to furnish assistance to any country or international organization, on such terms and conditions as he may determine, for the control of . . . smuggling of, and traffic in, narcotic and psychotropic drugs.

22 U.S.C. § 2291(a)(1976).[4]

Congress clearly recognized, as the Supreme Court did in *Cook* v. *United States,* 288 U.S. 102 (1933), that the Executive could negotiate special jurisdictional arrangements with foreign nations which would *prevent* the exercise of our law. When it passed the Anti-Smuggling Act of 1935, Congress acted to protect agreements like the British-American Liquor Treaty. *See* note 2. It added 19 U.S.C. § 1581(h):

> [T]his section shall not be construed to authorize or require any officer of the United States to enforce any law of the United States upon the high seas upon a foreign vessel in contravention of any treaty with a foreign government enabling or permitting the authorities of the United States to board, examine, search, seize, or otherwise to enforce upon said vessel upon the high seas the laws of the United States except as such authorities are or may otherwise be enabled or permitted under special arrangement with such foreign government.[5]

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[3] There are similar provisions in the Single Convention covering the opium poppy, the coco bush, and their products. The Single Convention is mentioned as indicative of U.S. legislative policy in 21 U.S.C. § 801(7).

[4] We note that the President must file semi-annual reports with Congress on these agreements. 22 U.S.C. § 2291(b) (1976).

[5] *See also* H.R. Rep. No. 868, 74th Cong., 1st Sess. 5, 8 (1935); S. Rep. No. 1036, 74th Cong., 1st Sess. 9, 13 (1935); 79 Cong. Rec. 9075 (1935) (remarks of Rep. Hill). An almost identical provision involving revenue laws (antismuggling) can be found at 19 U.S.C. § 1701(b).

It also added 19 U.S.C. § 1587(a):

> [A]ny vessel . . . which, being a foreign vessel . . . is permitted by special arrangement with a foreign government to be so examined . . . may at any time be boarded and examined by any officer of the customs . . . [who] may also bring the vessel into the most convenient port of the United States to examine the cargo. . . .[6]

Thus, the Executive Branch has the authority to stop, board, search, and detain a foreign vessel pursuant to a special agreement with the flag state.[7]

II. The Legal Consequences of Holding a Vessel Seized on Behalf of a Flag State in U.S. Ports for Return to the Flag State

Assuming that the vessel is held in the United States at the request of the flag state, the flag state, on whose behalf the United States is acting, would not lose jurisdiction over the vessel when the ship is moved into U.S. territory. The special arrangement delineates the jurisdictional rules covering the vessel and by its terms the United States may waive any jurisdictional rights over it.[8] *See* discussion at III, *infra.* Therefore the vessel may be returned to the flag state at its request without compliance with domestic forfeiture law.

The Supreme Court recognized that the United States could limit its jurisdiction by treaty in *Cook v. United States,* 288 U.S. 102 (1933). Libels filed against a British ship were ordered dismissed because the ship had been seized further from shore than the British-American Liquor Treaty allowed. "The Treaty fixes the conditions under which a 'vessel may be seized . . .' . . . Our Government, lacking power to seize, lacked power, because of the Treaty, to subject the vessel to our laws." 288 U.S. at 121.

We recommend that the Draft Note make explicit that the United States has no independent jurisdiction when a vessel is seized on behalf of its flag state. Otherwise, third parties could argue that American courts have concurrent jurisdiction to hear their claims. The results of such an assertion of jurisdiction would be quite significant. First, as indicated below, third parties have rights once a boat has been seized—

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[6] Coast Guard officers are customs officers. 14 U.S.C. § 143 (1976). The Coast Guard's authority to enforce American law, 14 U.S.C. § 89(a) (1976), is not a limitation on any powers they may have under other laws. 14 U.S.C. § 89(c) (1976).

[7] We note that there may be administrative problems with the Draft Note. In order to seize a ship for violation of a flag state's laws, the members of the Coast Guard patrol will have to know what constitutes a violation of each flag state's drug laws. Whether this education is provided by seminars or brochures, it will involve time and expense. Regulations will also be needed to insure that the proper procedure is used in each case: *i.e.,* inclusion of the Venezuelan equivalent of *Miranda* warnings, should they exist. This would protect the flag state's interest in proper prosecution.

[8] In *Williams, supra,* the agreement had "specific jurisdictional procedural guidelines for the arrest, trial and custody of American Forces personnel accused of committing criminal offenses on Philippine soil." 449 F.2d at 520.

and automatically forfeited—under U.S. customs laws. Second, if the flag state decides it no longer desires to prosecute and the United States therefore decides to do so, there may be problems with using evidence obtained in the flag state by its officials. For example, in the Ninth Circuit, evidence produced by a "joint venture" between United States and Mexican authorities was suppressed because the *Mexican* officials failed to give the American defendants *Miranda* warnings. *United States* v. *Emery*, 591 F.2d 1266, 1267–68 (9th Cir. 1978). "The constitutional safeguards of *Miranda* should not be circumvented merely because the interrogation was conducted by foreign officials in a foreign country." 591 F.2d at 1268. *See also Brulay* v. *United States*, 383 F.2d 345, 349 n.5 (9th Cir.), *cert. denied* 389 U.S. 986 (1967) (discussing application of Fifth Amendment to statement given to foreign officials). An early decision as to which country will prosecute will insure that proceedings are handled uniformly and that the proper pretrial procedures are followed.

Under our hypothesis, a ship suspected of violating the flag state's laws is seized on behalf of the flag state by the United States. Must there be a hearing to determine whether there is probable cause to believe that the ship was involved in a violation of the flag state's law prior to return of the ship? Or may the ship be returned forthwith?

Where the ship is seized pursuant to a special agreement for a suspected violation of the flag state's law, we do not believe that a hearing is necessary. "[W]e think that once the President is properly found to possess the power to negotiate [criminal] jurisdictional arrangements . . . , the wisdom of the agreement and the details thereof are matters exclusively within the domain of the Executive and Legislative Branches." *Williams* v. *Rogers*, 449 F.2d 513, 521, 522–23 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972).[9] In *Williams*, the court of appeals held that an American serviceman was not entitled to a probable cause hearing before he was returned to the Philippines for a rape prosecution. "[Sgt. Williams] is being returned pursuant to a special agreement which neither imposes nor contemplates such a requirement." *Id.* at 522.

Where the United States is exercising the flag state's jurisdiction on the high seas—acting as custodian—and there has been an express renunciation of U.S. jurisdiction, we believe that relief for third parties would have to be obtained in the flag state's courts, not in ours. The flag state has the same exclusive criminal jurisdiction over its ships on the high seas, subject to treaty, that it has over them when they are in the flag state's waters.[10] Just as the flag state can make jurisdictional

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[9] The language is taken from *Wilson* v. *Girard*, 354 U.S. 524, 530 (1957) (*per curiam*). In *Wilson*, the Supreme Court upheld certain jurisdictional arrangements of an administrative agreement between Japan and the United States.

[10] A law that, as one of your hypotheses suggested, automatically transferred the right to the vessel's possession or title to the flag state would not strengthen the flag state's criminal jurisdiction

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agreements with the United States over the exercise of jurisdiction within the flag state's territory, we believe that it can also enter into special arrangements regarding its criminal jurisdiction over its vessels on the high seas.

This reasoning is supported by the logic of decisions such as *Holmes* v. *Laird*, 459 F.2d 1211, 1217 (D.C. Cir. 1972). Two American soldiers who had been convicted of rape in West Germany fled to the United States. They filed habeas corpus petitions, charging, among other things, that because their trial in West Germany had been unfair,[11] it was unconstitutional for the U.S. Government to return them to serve their prison sentence.

> The argument, in essence, is that the turnover of an American citizen for service of a sentence imposed in culmination of an unfair foreign trial is a governmental involvement which the Constitution does not tolerate. . . .
>
> To be sure, "no agreement with a foreign nation can confer power on . . . any . . . branch of Government, which is free from the restraint of the Constitution." And no more than the supremacy of the Constitution over treaties like NATO SOFA can its supremacy over executive augmentations like the Supplementary Agreement with the Federal Republic be doubted. Nor can it be doubted that out Nation's performance as well as its making of international compacts must observe constitutional mandates. The fatal difficulty in appellants' position, however, is that these considerations are beside the point.
>
> Here we deal, not with an American prosecution in an American tribunal at home or abroad, but with a West German trial in a West German court—a trial for offenses under West German law allegedly committed in West Germany against a West German citizen. Obviously, the constitutional provisions appellants invoke exerted no force of their own upon the Federal Republic in that exercise of its sovereignty. And while, of course, American officials having custody of appellants are fully subject to constitutional commands, *it must be remembered that the contemplated surrender is the precise response required of the United States by its treaty commitments to the Federal Republic.* The Constitution plays no part in this case

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over the vessel, since that jurisdiction is already complete. However, it would provide an additional argument to defeat any attempt by a third party to persuade an American court to assert concurrent jurisdiction.

[11] They claimed that their trial had violated various provisions of the NATO SOFA agreement, including confrontation of their accuser and appointment of counsel of their choice. 459 F.2d at 1214.

> unless somehow it operates to negate those commitments in the circumstances appellants allege.

459 F.2d at 1217–18 (footnotes omitted; emphasis added). Likewise the appellants' argument that the court should not enforce the NATO SOFA agreement because West Germany had allegedly breached it was unpersuasive.

> The same result is plainly dictated here, where appellants trace the rights they claim to the provisions of an international agreement the enforcement mechanism of which is diplomatic recourse only. NATO SOFA . . . is explicit that '[a]ll differences . . . shall be settled by negotiations without recourse to any outside jurisdiction'. . . . In sum, intervention by an American court into the matters of which appellants complain is foreclosed by the very terms of the document from which the rights insisted upon are said to spring.

459 F.2d at 1222 (footnote omitted). Similarly, NATO SOFA was held to deny American jurisdiction in an action by Germans against American naval forces under the Public Vessels Act. *Shafter* v. *United States*, 273 F. Supp. 152 (S.D.N.Y. 1967). "There is nothing unfair or irrationally discriminatory in recognition by our government of *exclusive* jurisdiction in a civilized foreign State over disputes concerning events and people within the territory of that State." 273 F. Supp. at 157 (emphasis added).

We also believe that where the ship is seized on behalf of the flag state, there is no taking within the meaning of the Fifth Amendment. The United States is not claiming to own or have rights in the flag state's ships—it has arrested them. More than a hundred years ago, the President refused to allow three American ships to leave New York City because he believed that their owners planned to use them in a private expedition against Nicaragua.

> It was contended for the petitioner . . . that the act of the President . . . was the act of the state, and a taking of the private property of the petitioner for public use. But we think the facts found do not support this claim. They showed that the vessels were prevented from leaving the harbor of New York, and thus were, in the language of the statute, and under it, "*detained.*" And we think, . . . that this was neither *a taking* nor *a use*, as those words are used in the Constitution, where they imply and require the exercise by the state of a proprietary right, for a greater or less time in the property taken. Then the detention was at the most an arrest under the statute, which was for the case "due process of law."

> And an arrest under process of law never makes a contract, and cannot without malice, which is not shown here, make a tort. Therefore the loss and inconvenience the petitioner has suffered are ***damnum absque injuria,*** which is not a ground for an action at law.

Graham v. *United States,* 2 Ct. Cl. 327, 340 (1866) (emphasis in original). As was stated explicitly in a later case,

> The distinction between an exercise of eminent domain power that is compensable under the fifth amendment and an exercise of the police power is that in a compensable exercise of the eminent domain power, a property interest is taken from the owner and applied to the public use because the use of such property is beneficial to the public[;] and in the exercise of the police power, the owner's property interest is restricted or infringed upon because his continued use of the property is or would otherwise be injurious to the public welfare.

Franco-Italian Packing Co. v. *United States,* 128 F. Supp. 408, 414 (Ct. Cl. 1955).

Similarly, the United States' refusal to grant clearance to a Dutch ship during World War I was held not to constitute a taking. *Royal Holland Lloyd* v. *United States,* 73 Ct. Cl. 722, 732–33 (1932). However, the Court of Claims, acting under a special jurisdictional grant, held that the United States had had no authority under international law to detain the ship of a neutral nation. 73 Ct. Cl. at 744–45. Therefore, damages were assessed to compensate the owners. Under the proposed agreements, the United States *will* have the authority under international law to exercise its police powers to detain ships on behalf of their flag state. *See also Hurtado* v. *United States,* 410 U.S. 578, 588–89 (1973) (detention of a material witness not a taking because witness has public duty to testify); *Finks* v. *United States,* 395 F.2d 999, 1003–05 (Ct. Cl.), *cert. denied* 393 U.S. 960 (1968) (impoundment by U.S. Agency for International Development in Brazil of cars owned by American foreign service officers in order to prevent sale in violation of Brazilian customs law not a taking).

III. The Consequences of Seizing a Ship for Violations of U.S. Customs Laws

You have also asked what the legal consequences might be if a court were to find that a ship had been seized concurrently on behalf of the United States.

Violations of customs law are required by law to be reported immediately to the customs officer for referral to the United States Attorney. 19 U.S.C. §§ 1602, 1603, 1604. If the vessel is held for more than a few months, it is very possible that if forfeiture proceedings are instituted, a court would return the property to its registered owner. Delay in instituting forfeiture proceedings has been held repeatedly to constitute a violation of due process.[12]

> There is now a course of decisions holding that if the delay between the seizure and commencement of district court proceedings is substantial, unexcused and unreasonable, such delay will, on due process grounds, itself bar the government from proceeding further. How much delay has that effect seems to be a mixed question of fact and law to be decided in light of the facts of the particular case.

United States v. *Eight(8) Rhodesian Stone Statues,* 449 F. Supp. 193, 204 (C.D. Cal. 1978). A requirement of "reasonable dispatch" was read into § 1603 by the court in *United States* v. *One(1) Douglas A-26B Aircraft, etc.,* 436 F. Supp. 1292, 1296 (S.D. Ga. 1977). "Where the delay operates to deny claimant his constitutional and statutory rights to prompt adjudication of rights in the seized property, the forfeiture action must be dismissed." *Id.*[13]

Technically, "the forfeiture takes effect immediately upon the commission of the [illegal] act. . . ." *United States* v. *Stowell,* 133 U.S. 1, 16 (1889). The subsequent court proceedings merely vest title official in the Government.[14] There is no taking if the boats are seized under U.S. customs law—since the vessel would be automatically forfeited at the moment of seizure (if not earlier, when the first criminal act was committed). Forfeiture proceedings are not takings under our Constitution. *Calero-Toledo* v. *Pearson Yacht Leasing Co,* 416 U.S. 663, 680-90 (1974); *United States* v. *One 1975 Mercedes 280S,* 590 F.2d 196, 198-99

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[12] This may be due in equal part to the increased pressure for a hearing and speedy determination of rights mandated by *Fuentes* v. *Shevin,* 407 U.S. 67 (1972), and to the judiciary's desire to mitigate the harshness of forfeiture proceedings, especially when it is clear that the owner is innocent of any wrong doing.

[13] *See also White* v. *Acree,* 594 F.2d 1385, 1388-9 (10th Cir. 1979) (must be referred "promptly and within short time limits"); *Ivers* v. *United States,* 581 F.2d 1362, 1367-8 (9th Cir. 1978); *United States* v. *One 1970 Ford Pickup, Serial No. F10YRG53615,* 564 F.2d 864, 866 (9th Cir. 1977) (11 months); *Stypmann* v. *City and County of San Francisco,* 557 F.2d 1338, 1343-4 (9th Cir. 1977) (5 days) (towed car); *United States* v. *One Motor Yacht Named Mercury,* 527 F.2d 1112, 1114 (1st Cir. 1975) (12½ months); *States Marine Lines, Inc.* v. *Shultz,* 498 F.2d 1146, 1155 (4th Cir. 1974) (1 year); *Sarkisian* v. *United States,* 472 F.2d 468, 472 (10th Cir.), *cert. denied,* 414 U.S. 976 (1973) (9 months); *United States* v. *Eight(8) Rhodesian Stone Statues,* 449 F. Supp. 193 (C.D. Ca. 1978) (16 months); *United States* v. *One(1) Douglas A-26B Aircraft, etc., supra,* (9½ months); *Boston* v. *Stephens,* 395 F. Supp. 1000, 1005 (S.D. Ohio 1975) (6 months); *United States* v. *One 1971 Opel G.T., etc.,* 360 F. Supp. 638, 640-42 (C.D. Ca. 1973) (7 months). *But see United States* v. *One 1973 Buick Riviera Automobile,* 560 F.2d 897, 901 (8th Cir. 1977) (5-month delay permissible); *United States* v. *One 1971 Volvo 2-Door Sedan,* 393 F. Supp. 843, 846-7 (C.D. Ca. 1975) (2-month delay permissible).

[14] *See Calero-Toledo* v. *Pearson Yacht Leasing Co.,* 416 U.S. 663, 683-84 (1974); *United States* v. *Stowell,* 133 U.S. 1, 17 (1890); *Thacher's Distilled Spirits,* 103 U.S. 679, 682 (1880); *Henderson's Distilled Spirits,* 81 U.S. (14 Wall.) 44, 56-59 (1871); *The Palmyra,* 25 U.S. (12 Wheat.) 1, 14-15 (1827); *United States* v. *One 1973 Buick Riviera Automobile,* 560 F.2d 897, 900 (8th Cir. 1977). Thus, innocent purchasers of the vessel are not protected.

(6th Cir. 1978); *Associates Investment Co.* v. *United States,* 220 F.2d 885, 888 (5th Cir. 1955).

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READEX FICHE

Constitutionality of State-Imposed Restrictions on Responses to Census Questions

The Supremacy Clause of the Constitution bars a state from imposing restrictions on its residents' responses to questions contained in census form.

Specific limited grant of power in the Constitution does not preclude Congress from enacting broader census legislation under the Necessary and Proper Clause.

Statutory delegation to the Secretary of Commerce and Director of the Bureau of Census is not excessive, considering long history of census legislation and practice, and census forms are within that delegation.

February 22, 1980

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF COMMERCE

This responds to the letter of the Legal Adviser, Bureau of the Census, seeking the opinion of this Office on the constitutionality of a bill introduced into the Senate of the State of Arizona that would limit census responses by residents of Arizona to their name, address, and age. It is our conclusion that such legislation, if enacted, would be unconstitutional under the Supremacy Clause of the Constitution (Art. VI, cl. 2) to the extent that it would purport to excuse residents of Arizona from answering questions in the census form that are authorized by federal law.

The primary authority for the census form for the 1980 census is 13 U.S.C. 141(a), pursuant to which:

> The Secretary [of Commerce] shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in such form and content as he may determine, including the use of sampling procedures and special surveys. In connection with any such census, the Secretary is authorized to obtain such other census information as necessary.

Section 141(g) defines the term "census of population" as a "census of population, housing, and matters relating to population and housing." 13 U.S.C. § 141(g). Section 5 of title 13 gives the Secretary of Commerce general implementing authority,[1] and the Joint Resolution of June 16, 1976, 90 Stat. 688, imposes on the Secretary of Commerce special obligations to collect and publish statistics indicating the conditions of Americans of Spanish origin or descent and to develop creditable estimates of undercounting of Americans of Spanish origin or descent in future censuses.

Under Article VI, clause 2 of the Constitution, state laws must yield to federal laws and regulations if these federal authorities are made "in pursuance" of the Constitution. The sponsors of the Arizona legislation seem to suggest that the census legislation conflicts with the Constitution of the United States because Article I, § 2, clause 3 of the Constitution provides only for the enumeration of the population, and, hence, that the Constitution does not permit the inclusion in the census of any additional questions. The notion that a specific limited grant in the Constitution precludes Congress from enacting broader statutes under other powers granted to it in the Constitution was rejected by the Supreme Court more than a century ago with specific reference to the census legislation. In the *Legal Tender Cases,* 79 U.S. (12 Wall.) 457, 536 (1871), which involved the constitutionality of the statutes making paper money legal tender, the argument was made that because the Constitution specifically authorized Congress to coin money and regulate its value (Art. I, § 8, cl. 5), Congress did not have any other powers in the monetary field. The Court held that under the Necessary and Proper Clause (Art. I, § 8, cl. 18) Congress could enact legislation in aid of one or more express powers "even if there is another express power given relating in part to the same subject but less extensive." As an example for this proposition, the Court stated:

> The Constitution orders an enumeration of free persons in the different States every ten years. The direction extends no further. Yet Congress has repeatedly directed an enumeration not only of free persons in the States but of free persons in the Territories, and not only an enumeration of persons but the collection of statistics respecting age, sex, and production. Who questions the power to do this?

12 Wall. at 536.

While this approval of the broad scope of census questions in the *Legal Tender Cases* was in the nature of dictum, the Circuit Court for the Southern District of New York in *United States* v. *Moriarity,* 106 F. 886, 891–92 (1901) discussed the pertinent constitutional considerations at length, and little can be added to this classic analysis. The court stated:

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[1] This section provides:

> The Secretary [of Commerce] shall prepare schedules, and shall determine the inquiries, and the number, form, and subdivisions thereof, for the statistics, surveys, and censuses provided for in this title.

Aug. 31, 1954, ch. 1158, § 5, 68 Stat. 1013.

> Respecting the suggestion that the power of congress is limited to a census of the population, it should be noticed that at stated periods congress is directed to make an apportionment, and to take a census to furnish the necessary information therefor, and that certain representation and taxation shall be related to that census. This does not prohibit the gathering of other statistics, if "necessary and proper," for the intelligent exercise of other powers enumerated in the constitution, and in such case there could be no objection to acquiring this information through the same machinery by which the population is enumerated, especially as such course would favor economy as well as the convenience of the government and the citizens. . . . It would be curious governmental debility that should incapacitate the nation from directing its census enumerator to ask an inhabitant concerning his business because for certain purposes he was only to be counted, and perhaps his gender ascertained. The functions vested in the national government authorize the obtainment of the information demanded by section 7 of the census act, and the exercise of the right befits an exalted and progressive sovereign power, enacting laws adapted to the needs of the vast and varied interests of the people, after acquiring detailed knowledge thereof. . . . For the national government to know something, if not everything, beyond the fact that the population of each state reaches a certain limit, is apparent, when it is considered what is the dependence of this population upon the intelligent action of the general government. Sanitation, immigration, naturalization, the opening and development of the public domain; the laying of taxes, duties, imposts, and excises, involving the adjustment of duties for the purposes of revenue to the domestic products of every kind, and the taxation of industries, . . . for these and similar purposes the government needs each item of information demanded by the census act, and such information, when obtained, requires the most careful study, to the end that the fulfillment of the governmental function may be wise and useful. . . . A government whose successful maintenance depends upon the education of its citizens may not blindly legislate, but may exercise the right to proclaim its commands, after careful and full knowledge of the business

> life of its inhabitants, in all its intricacies and activities. The demurrer should be overruled.

In *United States* v. *Rickenbacker,* 309 F.2d 462, 463 (2d Cir. 1962), *cert. denied,* 371 U.S. 962 (1963), also a case involving the validity of the questions contained in the census form, the court, per then Circuit Judge Thurgood Marshall, held:

> The authority to gather reliable statistical data reasonably related to governmental purposes and functions is a necessity if modern government is to legislate intelligently and effectively. *United States* v. *Moriarity,* 106 F. 886, 891-92 (C.C.S.D.N.Y. 1901). *Cf. United States* v. *Sharrow,* 309 F.2d 77 (2d Cir. 1962). The questions contained in the household questionnaire related to important federal concerns, such as housing, labor, and health, and were not unduly broad or sweeping in their scope.

The Supreme Court, in *Wyman* v. *James,* 400 U.S. 309, 321 (1971), referred with approval to the holding in *Rickenbacker* concerning the scope of the census questions.

Nor can it be said that 13 U.S.C. §§ 5 and 141(a) contain excessive delegations of statutory power, or that the census form, as promulgated, goes beyond the scope of the delegation. It is true that the delegations contained in 13 U.S.C. § 5 and in the last sentence of 13 U.S.C. § 141(a) are broad. It should be remembered, however, that these statutes involve an area in which Congress has legislated since 1790, and which legislation and practice have crystallized into well-known standards that guide the discretion of the Secretary of Commerce and the Director of the Bureau of the Census. *Fahey Mallonee,* 332 U.S. 245, 250 (1947); *see Yakus* v. *United States* 321 U.S. 414, 424–25 (1944). Hence the district court properly held in *United States* v. *Little,* 321 F. Supp. 388, 391 (D.Del. 1971):

> Congress has in 13 U.S.C. §§ 5 and 141(a) described the job to be done by the Secretary of Commerce and delineated the scope of his authority, viz. to "take a census of population unemployment, and housing (including utilities and equipment)." [2] The fact that there is a zone for the exercise of discretion by the Secretary in framing the questions which will elicit the necessary statistical information within the scope of the census to be undertaken does not render the delegation invalid. *Yakus* v. *United States,* 321 U.S. 414, 424–425, 64 S. Ct. 660, 88 L. Ed. 834 (1944). Further, in the absence of a clear showing (which has not been made in this case) that the Secretary's

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[2] This quotation is based on the language of 13 U.S.C. § 141(a) prior to its 1976 amendment.

> exercise of discretion was irrational, arbitrary or capricious, his actions will not be disturbed.

We have examined the 1980 census form. The questions asked appear to be either within the scope of the information traditionally asked in census forms or within the mandate of the Joint Resolution of June 16, 1976. It is therefore our conclusion that 13 U.S.C. §§ 5 and 141(a), as implemented by the 1980 census form, are valid laws of the United States made in pursuance of the Constitution. Moreover, in view of the statistical nature of census operations, it is imperative that the census questionnaire be answered uniformly throughout the United States. State legislation that purports to excuse the inhabitants of a state from having to answer some of the questions contained in the census forms would constitute "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Accordingly, the state legislation must give way to the federal law. *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941); *Jones* v. *Rath Packing*, 430 U.S. 519, 526 (1977).

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Use of Polygraph Examinations in Investigating Disclosure of Information About Pending Criminal Investigations

The Attorney General may order Justice Department employees to submit to polygraph tests to answer questions relating to pending criminal investigations, and may discharge an employee for refusing to take such a test.

Even where an employee is entitled to be discharged only "for cause," failure to cooperate with an official investigation by taking a polygraph test may constitute adequate cause, as long as the employee is given reasonable assurances respecting the need for the test and the use to which its results may be put.

February 22, 1980

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have asked us to consider the following questions regarding the use of polygraphs in investigating unauthorized disclosures of information about pending criminal investigations: (1) may a Justice Department employee be dismissed for refusing to submit to a polygraph test; and (2) may the results of a polygraph test be used against the employee in (a) administrative proceedings and (b) criminal proceedings? We conclude that the Attorney General may order Department employees to submit to polygraph tests to answer specific questions relating to pending criminal investigations and that employees who refuse to take polygraph tests may be discharged. If any employee is threatened with dismissal for refusing to take a polygraph test, then any evidence obtained through the test may not be used against the employee in a subsequent criminal proceeding. Employees should be warned prior to taking the test that their refusal to participate may lead to their dismissal, but that nothing they say can or will be used against them in a criminal proceeding. It is doubtful that evidence obtained by way of polygraph would, in any event, be admissible in a federal criminal proceeding, unless the employee stipulates to its admissibility.

I. Polygraphs and Federal Employment

The use of polygraphs for federal employment purposes has been the subject of controversy for a number of years. The discussion focuses on two conflicting trends: the growing scientific acceptance of the reliability of polygraphy and the increasing concern that polygraph examinations violate privacy rights and the Fourth, Fifth, and Fourteenth Amendments.

In 1965, the House Committee on Government Operations held hearings and issued a report on the use of polygraphs by the federal government. H. Rep. No. 198, 89th Cong., 1st Sess. (1965). The Committee Report noted that 19 federal agencies used polygraphs; the most frequently reported purpose of the use involved security matters. A total of just under 20,000 tests were administered in 1963. Eight agencies used polygraphs to investigate employee misconduct. (The Department of Justice indicated its use was limited to security and criminal matters.) The Committee strongly criticized the use of polygraphs; it concluded that the accuracy of such tests was unproven and that operators were generally unqualified and undertrained. *Id.* at 1–2.

In 1968, the Civil Service Commission promulgated regulations which prohibit use of polygraphs in employment screening and personnel investigations for members of the competitive service, except for national security purposes. This regulation, which does not apply to the excepted service, is currently in force. Federal Personnel Manual chapter 736, Appendix D.[1]

Senator Ervin introduced a number of bills which would have prohibited the use of polygraphs in the hiring or firing of federal employees and employees of industries affecting interstate commerce. S. 2156, 91st Cong., 2d Sess. (1971); S. 2836, 93d Cong., 1st Sess. (1973), *reprinted in* 119 Cong. Rec. 42681 (1973). *See also* H.R. 2596, 94th Cong., 1st Sess. (1975). None of these measures was enacted.

Additional congressional hearings were held in 1974 before the House Government Operations Committee.[2] A Deputy Assistant Attorney General for the Criminal Division testified that polygraphs had proven useful in a small number of investigations involving a "closed" group of persons—*e.g.*, persons with access to stolen or embezzled property. However, he noted that even in these circumstances, the Criminal Division viewed the results "with caution and opposes their introduction into evidence . . . ." *Hearings* at 414. A representative of the Federal Bureau of Investigation (FBI) testified that "the FBI's official position has always been that [it does] not consider polygraph examinations sufficiently precise to permit absolute judgment of guilt or non-guilt—lie or truth—without qualifications." *Id.* at 418. He added, however, that

> with proper ethics by the polygraph examiner and tight administrative control by the user agency, there is no question but that the polygraph can be a valuable investi-

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[1] The regulations require that agencies using polygraphs advise the individual of his or her privilege against self-incrimination and right to counsel. The individual must voluntarily consent to the examination and a refusal to consent may not be included in his or her personnel file.

[2] *The Use of Polygraphs and Similar Devices by Federal Agencies, Hearings Before the House Committee on Government Operations,* 93d Cong., 2d Sess. (1974) ("*Hearings*").

> gative aid to supplement interrogation in selected criminal and national security cases. Interrogation is a basic tool of any investigative agency and the FBI considers the polygraph technique a thorough and specialized interview procedure in which a skillful interrogator is attempting to simply ascertain the truthful facts from a consenting individual regarding a matter in which we have jurisdiction.
>
> In some instances suspects will admit deception and furnish confessions and/or signed statements. In most instances valuable new information or investigative direction is developed as a result of the examination and followup interrogation.

Id. at 419. The use of polygraphs was strongly criticized by the American Civil Liberties Union on constitutional and scientific grounds. *Id.* at 2–84.

A study prepared in 1974 by the staff of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee reached a conclusion similar to the House Committee in 1965. It stated that

> [c]ompulsory submission to a polygraph test is an affront to the integrity of the human personality that is unconscionable in a society which values the retention of individuals' privacy. . . . The Congress should take legislative steps to prevent Federal agencies as well as the private sector from requiring, requesting, or persuading any employee or applicant for employment to take any polygraph tests.

Staff of the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 93d Cong., 2d Sess., *Privacy, Polygraphs, and Employment,* 17–18 (Comm. Print 1974). The study also concluded, after reviewing the literature on polygraphs, that "doubt must be cast upon the objectivity, accuracy, and reliability of the polygraph test." *Id.* at 9.

Based on the above, it is clear that use of polygraphs for federal employment purposes remains controversial.[3] While civil service regulations prohibit their use for the competitive service, Congress has been made aware that no prohibition exists regarding the excepted service. Several bills that would have prohibited such use have not been enacted.

II. Attorney General's Authority to Terminate Employment

Analysis of the authority of the Attorney General to dismiss an employee for refusing to submit to a polygraph examination must begin with an understanding of the statutory and regulatory protections afforded different classes of Department employees.

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[3] States have taken an active role in limiting use of polygraphs in the employment context. Eighteen states have licensing procedures for polygraph examiners; 15 states prohibit use of polygraphs. *See* Comment, *Privacy: The Polygraph in Employment,* 30 Ark. L. Rev. 35, 37–38 (1976).

Under the civil service laws, Department attorneys and employees of the FBI are in the excepted service. 28 U.S.C. § 536 (FBI); 5 C.F.R. § 213.3102(d) (government attorneys). The Office of Personnel Management (OPM), by regulation, has exempted personnel in the excepted service from the statutory provisions regarding removal of civil servants. *See* 5 C.F.R. § 752.401(c). However, persons in the excepted service who are non-probationary "preference eligibles,"—primarily veterans and the spouses and mothers of disabled and deceased veterans—are afforded the civil service law protections. 5 U.S.C. § 7511(a)(1)(B). *See id.* § 2108 (defining "preference eligible"). The civil service law protections are substantive and procedural. A preference-eligible employee may be removed "only for such cause as will promote the efficiency of the service." Prior to removal, an employee is entitled to 30 days' advance written notice of the reasons for the action, a reasonable time to respond to the charges, the assistance of an attorney, a written decision, and an appeal to the Merit System Protection Board (MSPB). 5 U.S.C. § 7513; DOJ Order 1752.1.

Department employees who are in the excepted service and are not preference-eligibles have no rights arising from a statute or OPM regulation to a statement of reasons for discharge or to an appeal from an adverse action. *See Paige* v. *Harris,* 584 F.2d 178, 181 (7th Cir. 1978). However, the Department is bound by its own substantive standards and procedures even though the employee may have no legitimate expectation of continued employment and could, under relevant statutes, be summarily discharged by the Attorney General at any time. *See Vitarelli* v. *Seaton,* 359 U.S. 535, 539–40 (1959); *Paige* v. *Harris,* 584 F.2d at 184; *Mazaleski* v. *Treusdell,* 562 F.2d 701, 717 n.38 (D.C. Cir. 1977). Department Order 1752.1 (1975), as supplemented by a March 27, 1979 notice, establishes minimal procedures for Department attorneys who are not preference-eligibles. Chapter 6 of the order entitles them only to "a letter of termination prior to the effective date of the termination . . . [which provides] a brief statement of the reasons for the termination."[4]

Substantively, Department attorneys are provided no protections by Department regulations. And since they are not covered by the "for cause" standard of the civil service laws, attorneys apparently serve at the pleasure of the Attorney General. The Attorney General's authority to remove Assistant United States Attorneys (AUSA) is expressly recognized by statute. *See* 28 U.S.C. § 542(b).

This conclusion must be qualified because of recent cases that have held that agency handbooks and informal understandings may establish substantive protections for federal employees. In *Ashton* v. *Civiletti*, 613 F.2d 923 (D.C. Cir. 1979), the D.C. Circuit held that "the FBI has fostered rules and understandings which [entitle an FBI employee] to believe that he would lose his job only for a job-related reason." 613 F.2d at 928.[5] The court recognized that FBI employees are in the excepted service and that "[s]tanding alone, the exception could suggest to an employee that he held his job at the sufferance of his employer." It went on to find, however, that the FBI Handbook, Manual of Instructions, and the plaintiff's letter of appointment created an implied promise that the employee would be dismissed "only for failing to perform his duties satisfactorily and without prejudice to the FBI's achievement of its law-enforcement mission." 613 F.2d at 930. In essence, the court held that FBI employees, even though placed in the excepted service by statute, may be discharged only upon a finding of cause similar to that required for dismissal of members of the competitive service.[6] Once it is determined that an employee has a legitimate claim to continued employment—*i.e.*, that he or she may be not be fired at any time—then procedural due process applies: the employee must be afforded a hearing and other procedural safeguards.

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[4] FBI employees are excluded altogether from DOJ Order 1752.1.

We are unaware of any handbooks or guidelines upon which Department attorneys could rely to establish a legitimate claim to continued employment. We cannot, however, rule out the possibility that an attorney could point to a letter of appointment or to informal understandings which a court would deem sufficient to establish a property interest.[7]

In sum, the Attorney General probably has the authority to dismiss a non-veteran Department attorney for any reason, and the attorney is entitled only to a statement of reasons for the discharge. Non-veteran FBI agents probably may be discharged only for job-related reasons, even though they are in the excepted service; they are entitled to a due process hearing. Department employees who are veterans may be discharged only for cause and are entitled to statutory, OPM and DOJ procedural rights.

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[5] The case concerned the FBI's discharge of an employee because of his admitted homosexuality. The court held that the employee was entitled to a due process hearing prior to termination to determine whether his homosexuality constituted a job-related basis for his dismissal.

[6] *See also Paige* v. *Harris*, 584 F.2d 178 (7th Cir. 1978) (HUD Handbook provides rules and understandings creating legitimate claim to continued employment for employees in the excepted service); *Colm* v. *Vance*, 567 F.2d 1125 (D.C. Cir. 1977) (remanding for consideration of whether the Foreign Service Act requires promotion to be based solely on performance and merit, even though plaintiff could demonstrate no constitutional property entitlement to promotion).

[7] For example, it is conceivable that a court could find that when an AUSA agrees to a 3-year commitment with a U.S. Attorney's Office, that that agreement constitutes a promise by the Department not to discharge the attorney during that period without good cause. A court might also hold that the Department's regulation requiring a statement of reasons for termination implicitly requires the Department to have a "good" reason.

III. What Constitutes "Cause"

As noted above, the civil service laws authorize removal of covered civil servants "only for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513. The D.C. Circuit has similarly held that an FBI employee may be dismissed "only for failing to perform his duties satisfactorily and without prejudice to the FBI's achievement of its law-enforcement mission." *Ashton* v. *Civiletti, supra.*[8] The question is whether failure to obey an order to submit to a polygraph examination is sufficient cause for discharge under these standards. The following discussion assumes that at the time the employee is ordered to take the test, the employee is assured both that he or she may be discharged for refusing to take the test and that no information obtained in the course of, or as a result of, the examination may be used against him or her in a subsequent criminal proceeding.[9]

At the minimum, failure to obey a legitimate order of a superior constitutes insubordination—an offense punishable by removal. *See* FBI Manual of Instructions, Part I, § 1–20–2 (refusal to cooperate during an interview regarding work-related matters permits discipline for insubordination); § 13, Schedule of Offenses and Penalties for FBI Employees (insubordination punishable by censure to removal). A refusal to submit to a polygraph test also arguably impedes investigation of government misconduct. It thus directly effects the efficiency of the Department by hindering removal of offending employees and restoration of public confidence in the Department. The Schedule of Disciplinary Offenses and Penalties for DOJ Employees, included in DOJ Order 1752.1, identifies the offense of "refusal to cooperate in an official government inquiry" and lists the suggested discipline as "official reprimand to removal."

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[8] It is quite clear that the underlying conduct—disclosure of facts of a pending criminal investigation—permits removal of the offending employees. The conduct may violate various criminal statutes and plainly violates a number of OPM and DOJ standards of conduct. *See, e.g.*, 5 C.F.R. §§ 735.201a(c) (impeding government efficiency); (e) (making a government decision outside official channels); (f) (affecting adversely the confidence of the public in the integrity of the government); 735.206 (misuse of information not made available to the general public); 735.209 (conduct prejudicial to the government); 28 C.F.R. §§ 45.735–2(c)(3) (impeding government efficiency); (c)(6) (affecting adversely the confidence of the public in the integrity of the government); 45.735–10 (improper use of official information); 45.735–18 (1980) (conduct prejudicial to the government).

It is possible that an employee charged with unauthorized disclosure may assert a First Amendment defense: that the government may not constitutionally prohibit him or her from commenting on matters of public importance. While the employee may have an interest in commenting upon matters of public interest, this interest must be balanced against the government's interest in promoting the efficiency of the public services it performs through its employees. *See Pickering* v. *Board of Education*, 391 U.S. 563 (1968). The D.C. Circuit has identified the relevant factors in the "balancing test" as: the sensitivity and confidential nature of the employee's position and the government's consequently legitimate need for secrecy; the subject matter of the speech; the truth or falsity of the speech; the interference with job performance; the context of the speech; the effect of the speech on agency morale and working relationships with immediate superiors. *Hanson* v. *Hoffman*, 628 F.2d 42, 50 (D.C. Cir. 1980). It would appear that the government's interest in preventing disclosure is at its maximum in regard to information relating to pending criminal investigations.

[9] Without these assurances, an employee could not constitutionally be fired for refusing to take the polygraph test. *See Kalkines* v. *United States*, 473 F.2d 1391 (Ct. Cl. 1973); *see also Sanitation Men* v. *Sanitation Commissioner*, 392 U.S. 280 (1968).

The obligation of public officials to answer questions related to the performance of their public duties is well-recognized. The Supreme Court has upheld the right of public employers to fire employees solely for their refusal to sign affidavits or answer questions related to their fitness to perform their public functions. *See, e.g., Lefkowitz* v. *Turley,* 414 U.S. 70, 84 (1973); *Sanitation Men* v. *Commissioner,* 392 U.S. at 285; *Beilan* v. *Board of Education,* 357 U.S. 399 (1958). These holdings are based on the recognized public interest in the accountability of public servants. This interest appears at its zenith when the integrity of law-enforcement activities is at stake. As stated by Justice Harlan,

> [I]t is surely plain that [a State] may . . . require its employees to assist in the prevention and detection of unlawful activities by officers of the state government. The urgency of these requirements is the more obvious . . . where the conduct in question is that of officials directly entrusted with the administration of justice. The importance for our systems of justice of the integrity of local police forces can scarcely be exaggerated.

Garrity v. *New Jersey,* 385 U.S. 493, 507-08 (1967) (Harlan, J., dissenting).[10]

Thus, if the use of polygraphs is deemed a necessary part of an investigation of leaks, then a refusal to submit to such a test could impede the investigation and consequently hinder the efficiency of the Department. Department standards of conduct recognize the affirmative duty of employees to cooperate with official investigations, and refusals to cooperate are deemed serious enough offenses to warrant removal in appropriate cases. We can see no meaningful difference between compelling an employee to answer questions or sign an affidavit and compelling an employee to submit to a polygraph test.[11] While the results of the test may be open to question and debate, the refusal to take the test may properly be characterized as conduct which does not promote the efficiency of the Department. Accordingly, we believe that an employee could be dismissed for refusing to take a polygraph examination.[12]

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[10] Although the Court held in *Garrity* that the incriminating statements of a public official obtained under threat of dismissal could not be used in a criminal proceeding, the majority did not disagree with Justice Harlan's statement regarding the public interest that public officers provide information about the conduct of their activities. *See also Gardner* v. *Broderick,* 392 U.S. 273, 278 (1968).

[11] We reach this conclusion even though we recognize that the use of a polygraph is a greater intrusion into an individual's privacy to the extent it probes unrelated matter, private thoughts, and beliefs.

[12] One district court has upheld the authority of a city transit authority to fire employees suspected of intoxication who refuse to submit to urinalysis or blood tests. The court relied upon the *Garrity* line of cases for the proposition that public employees may be discharged for refusal to properly account for the performance of their duties. *Division 241, Amalgamated Transit Union* v. *Suscy,* 405 F. Supp. 750 (N.D. Ill. 1975), *aff'd, per curiam,* 538 F.2d 1264 (7th Cir.), *cert. denied,* 429 U.S. 1029 (1976).

An arguable objection to this conclusion may be phrased as follows. Polygraph tests have not achieved recognized acceptance among the courts and the experts as accurate indicators of truth-telling. For example, the test may show deception where a truthful subject is nervous, tense, over-tired, or angry, or when an examiner asks misleading or inadequate questions. *See United States* v. *Alexander,* 526 F.2d 161, 165 (8th Cir. 1975). Thus, where an employee believes that the results of the polygraph will not be accurate, refusal to take the examination should not be grounds for removal.

We believe that if the investigator can establish a reasonable basis for the use of the polygraph in the course of the investigation, then a refusal by an employee to take the test would be impermissible, notwithstanding the subjective fear of the employee. A reasonable basis would be established by showing the need for use of the technology and the state of the art. We believe that adequate scientific evidence exists which would support an investigator's decision that polygraphy could be helpful in the pursuit of the investigation. *See, e.g., United States* v. *De Betham,* 470 F.2d 1367 (9th Cir. 1972) (*per curiam*), *cert. denied,* 412 U.S. 907 (1973) (although holding that district court did not abuse discretion in excluding polygraph evidence, court noted that evidence "vigorously support[ed] the accuracy of polygraphic evidence"); *United States* v. *Oliver,* 525 F.2d 731, 737 (8th Cir. 1975), *cert. denied,* 424 U.S. 973 (1976) (upholding admission of polygraph evidence where parties stipulated admissibility; court could not conclude that polygraph "is so unreliable as to be inadmissible in this particular case"); Tarlow, *Admissibility of Polygraph Evidence in 1975: An Aid in Determining Credibility In a Perjury-Plagued System,* 26 Hastings L.J. 917 (1975).[13] We recognize, however, that reliability of polygraphy remains hotly contested, and courts of appeal have permitted introduction of polygraph evidence only when the parties have stipulated to its admissibility. *See United States* v. *Alexander, supra* (summarizing cases and denying trend of admitting polygraph evidence); *Hearings, supra.*[14]

The reasonableness of the use of a polygraph would be supported by a record establishing the reason for its use, the expected accuracy of the technology, the qualifications of the examiner, and the reliance upon other evidence to establish and corroborate the results of the investigation.[15] Once the reasonable basis for the use of polygraphy is established, we do not believe than an employee can, with impunity, refuse to take the examination any more than he or she could refuse to submit to fingerprinting or blood-typing.

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[13] One factor frequently cited by courts for excluding polygraph evidence is the probability that the jury will accord it undue weight. Of course, this concern is not present when administrative proceedings are contemplated.

[14] The D.C. Circuit continues to adhere to its *per se* rule against admissibility as established by the leading case of *Frye* v. *United States,* 293 F. 1013 (D.C. Cir. 1923). *See United States* v. *Skeens,* 494 F.2d 1050 (D.C. Cir. 1974).

[15] Presumably, the quality of the examination and the qualifications of the examiner would be quite high if the examination is conducted by FBI polygraph experts.

IV. Use of the Results of a Polygraph Test

As long as the employee is promised that any evidence obtained in the course of the polygraph test will not be used in a subsequent criminal proceeding, the Fifth Amendment does not bar its use in an administrative proceeding.[16] Of course, such a promise, and the Fifth Amendment, prohibit use in any criminal proceeding. *Garrity* v. *New Jersey, supra.*

V. Conclusion

We conclude that the Attorney General may discharge an employee for refusing to take a polygraph examination where the examination is necessary to an official investigation of unauthorized disclosures about pending criminal investigations, provided that the employee has been warned that failure to submit to the test could lead to his or her dismissal and that nothing obtained in the examination will be used against the employee in a subsequent criminal proceeding. Even if a court were to hold that Department attorneys may only be discharged "for cause," we conclude that, generally, failure to cooperate with an official investigation is adequate cause, although each situation must be evaluated on a careful case-by-case basis.

LARRY A. HAMMOND
Acting Assistant Attorney General
Office of Legal Counsel

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[16] Because of the controversy surrounding the use of polygraphs, it is possible than an employee discharged solely on the basis of polygraphic evidence would challenge the dismissal as arbitary and irrational agency action. We do not believe that, absent a judicially recognizable property or liberty interest, an employee may challenge agency action as a violation of due process unless the agency has not followed its own regulations. *See Paige* v. *Harris*, 584 F.2d at 184; *cf. Bishop* v. *Wood*, 426 U.S. 341 (1976). At least one court, however, has held that a government decision is subject to challenge as arbitrary and capricious even where the employee has no property right in continued employment. *Heaphy* v. *U.S. Treasury Dept.*, 354 F. Supp. 396 (S.D.N.Y. 1973) (Tyler, J.), *aff'd on opinion below*, 489 F.2d 735 (2d Cir. 1974). If a court were to permit a challenge to a dismissal based solely on the results of a polygraph examination, the non-arbitrariness of the action would depend upon such factors as the quality of the examination, the skill and training of the examiner, and the inherent credibility of the employee's statements.

Administratively Uncontrollable Overtime of Agent/Examiners in the FBI Laboratory

Under 5 U.S.C. § 5545(c)(2), premium pay on an annual basis is authorized for "Administratively Uncontrollable Overtime" where duties of position are of such a nature that they cannot be performed during normal business hours.

Whether work performed by agent-examiners in the Federal Bureau of Investigation Laboratory is by its nature such as to qualify them for premium pay under § 5545(c)(2) is a question of fact.

February 22, 1980

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, JUSTICE MANAGEMENT DIVISION

This responds to your request for our comments on a letter from the General Accounting Office (GAO) to the Attorney General concerning the applicability of administratively uncontrollable overtime (AUO) to agent-examiners in the Federal Bureau of Investigation (FBI) Laboratory.

As you know, it is not the function of this Office to decide questions of fact; hence we cannot, and indeed lack the information to, comment on the factual statements contained in the GAO letter. Our role, therefore, must be limited to providing you with considerations governing and the tests for determining the applicability of AUO.

AUO is provided for in 5 U.S.C. § 5545(c)(2), pursuant to which:

> [t]he head of an agency, with the approval of the Office of Personnel Management, may provide that—
>
> * * * * *
>
> (2) an employee in a position in which the hours of duty cannot be controlled administratively, and which requires substantial amounts of irregular, unscheduled, overtime duty with the employee generally being responsible for recognizing, without supervision, circumstances which require him to remain on duty, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for regularly scheduled overtime, night, and Sunday duty, and for holiday duty. Premium pay under this paragraph is determined as an appropriate percentage, not less than

> 10 per centum nor more than 25 per centum, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10, by taking into consideration the frequency and duration of irregular unscheduled overtime duty required in the position.[1]

This complicated section is derived from § 204 of the Federal Employees Pay Amendments of 1954, 68 Stat. 1109. According to the legislative history, this provision was "specifically directed at those investigators of criminal activities whose positions meet all conditions specified" in the section. S. Rep. No. 1992, 83d Cong., 2d Sess. 8-9 (1954); *see also* H.R. No. 2665, 83d Cong., 2d Sess. 23 (1954).

The implementing regulations issued by the Office of Personnel Management (OPM), 5 C.F.R. § 550.153, are illustrative of the typical situations that § 5545(c)(2) is designed to cover:

> § 550.153 Bases for determining positions for which premium pay under § 550.151 is authorized.
>
> (a) The requirement in § 550.151 that a position be one in which the hours of duty cannot be controlled administratively is inherent in the nature of such a position. A typical example of a position which meets this requirement is that of an investigator of criminal activities whose hours of duty are governed by what criminals do and when they do it. He is often required to perform such duties as shadowing suspects, working incognito among those under suspicion, searching for evidence, meeting informers, making arrests, and interviewing persons having knowledge of criminal or alleged criminal activities. His hours on duty and place of work depend on the behavior of the criminals or suspected criminals and cannot be controlled administratively. In such a situation, the hours of duty cannot be controlled by such administrative devices as hiring additional personnel; rescheduling the hours of duty (which can be done when, for example, a type of work occurs primarily at certain times of the day); or granting compensatory time off duty to offset overtime hours required.

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[1] According to the opening clause of 5 U.S.C. § 5545(c)(2), the allowance of AUO requires the approval of the Office of Personnel Management (OPM). Moreover, as authorized by 5 U.S.C. § 5548, OPM has issued regulations interpreting § 5545(c)(2). In these circumstances, the application of the pertinent law to the specific facts would appear to be primarily within the jurisdiction and responsibility of OPM. Moreover, since OPM, or rather its predecessor the Civil Service Commission (CSC), presumably approved the allowance of AUO in the FBI Laboratory, that approval would be entitled to the greatest respect if the working conditions in the FBI Laboratory are still the same as those on which the CSC approval of AUO was based.

These regulations, together with a number of judicial decisions interpreting § 5545(c)(2), *e.g.*, *Burich* v. *United States*, 366 F.2d 984 (Ct. Cl. 1966), and *Fox* v. *United States*, 416 F. Supp. 593 (1976) (both involving United States Marshals Service),[2] establish the general considerations for applying that section. The basic consideration is that the principal test is the nature rather than the amount of the work. Overtime caused by the amount of work is administratively "controllable" within the meaning of the section according to 5 C.F.R. § 550.153, *supra*, because it can be avoided at least theoretically by the hiring of additional personnel. 5 C.F.R. §550.153 and *Fox* v. *United States*, *supra* at 595–96, 598.

On the other hand, overtime is generally uncontrollable where the work is of such a nature that it cannot be interrupted at the normal quitting time and resumed the next morning. A typical example of such assignments, of course, is the investigatory work referred to in the legislative history of the 1954 Act, in the OPM regulations, and *Fox* v. *United States*, *supra*, at 597. Other examples are work schedules mandated by other agencies, *e.g.*, the demands of the courts on the Marshals' services. *Id.*, at 595–96. Laboratory work may be uncontrollable where the result is needed urgently for a trial or an investigation, or where a test has to be brought to its conclusion and cannot be interrupted. These considerations were expressed in the *Burich* case as follows:

> [A]s a consequence of his regular assignments, he experienced erratic and irregular periods of overtime work. His assignments were received on a daily basis, but *neither the nature of the work nor the length of time required in its performance could be ascertained beforehand.* To the extent that this work involved overtime, it is clear that such overtime could perhaps be anticipated, but it could not be regulated. And thus the point of distinction *is that plaintiff was not assigned overtime; he was assigned a task which might require overtime.* Under such circumstances, his additional duty hours represented administratively uncontrollable overtime rather than regularly scheduled overtime.

366 F.2d at 988 (emphasis supplied).

The critical notion inherent in all those discussions and tests is the assignment of a task that according to its nature—and not because of a shortage of manpower—has to be completed without regard to normal business hours.

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[2] Other cases construing § 5545(c)(2) are *Byrnes* v. *United States*, 330 F.2d 986 (Ct. Cl. 1964), and *Fix* v. *United States*, 368 F.2d 609 (Ct. Cl. 1966).

As indicated above, this Office is not familiar with the duties of agent-examiners in the FBI Laboratory. We do not consider it appropriate for us either to criticize or to accept the analysis of those positions in the GAO letter. We believe, however, that our discussion, together with the factual data you have requested from the FBI, will assist you in preparing a reply to the GAO.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Application of Conflict of Interest Rules to the Conduct of Government Litigation by Private Attorneys

Whether the American Bar Association's Code of Professional Responsibility would bar private attorneys, retained as contractors to represent the interests of the United States in railroad litigation, from simultaneously representing other parties whose interests are adverse to those of the United States, depends on the facts of each situation.

Ethical constraints on private attorneys retained to conduct railroad litigation on behalf of the United States do not end with the termination of the railroad litigation itself.

The making of litigation judgments is a function at the core of the President's Article II duty to take care that the laws be faithfully executed, and must, therefore, be performed by those who serve under, and are responsible ultimately to, the President.

The scope of ethical restraints on private attorneys retained by the United States depends upon extent of necessary interaction with and supervision by government officials; if close interaction and supervision can be anticipated, likelihood of ethical problems developing increases.

Appendix identifies and discusses issues under the conflict of interest laws applicable to the temporary appointment of an attorney in private practice as a government attorney.

February 22, 1980

MEMORANDUM OPINION FOR THE SPECIAL ASSISTANT TO THE ATTORNEY GENERAL

This responds to your request for our discussion of the possible application of the American Bar Association's Code of Professional Responsibility (ABA Code) to a transfer of litigation from the United States Railway Association (USRA) to a department or agency, such as the Department of Justice. This issue has arisen in the course of this Department's preparation of a feasibility study for Congress on the transfer of USRA's litigation to an agency of the government. This Office has written two earlier memoranda that bear on that subject.[1] At this time, you have requested our discussion of the following question. Assuming that USRA is abolished and its litigation were transferred pursuant to statute to the Department of Justice, and assuming that the Department received authority to hire private attorneys as contractors to represent the interests of the United States in litigation,[2] would the Code bar such private attorneys from simultaneously representing in other litigation corporations or other parties whose interests are adverse to those of the United States?

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[1] One memorandum dealt directly with the issue of possibly transferring USRA's litigation to the Department of Justice. *See* memorandum of April 11, 1979, for the Deputy Associate Attorney General, "Possibility of Transferring the Litigating Functions of the United States Railway Association to the Department of Justice." A second memorandum discussed at a general level the application of conflict of interest statutes and principles to the conduct of government litigation by private counsel. *See* memorandum of March 23, 1979, for the Deputy Associate Attorney General, "Questions Raised by Proposed Appointment of Lawyer in Private Practice as a Government Attorney for Purposes of Trying Selected Civil Cases." [Note: The March 23, 1979, memorandum is published as an appendix to this opinion at p. 441, *infra.* Ed.]

We should stress at the outset that the application of the ABA Code in this situation, as in others, depends on the particular facts of each case. Of crucial importance, of course, is the nature of the representation which the private attorneys may seek to undertake or have already undertaken. These facts are, in the first instance, peculiarly within the knowledge of the private attorneys. Therefore, in this discussion we can only identify the general principles that would apply in a particular case.

Three of the ABA Code's canons of ethics may bear on a situation in which a private attorney is to be engaged as an independent contractor of the Department to conduct railroad litigation. Canon 4 provides that a lawyer should preserve the confidences and secrets of a client learned while representing the client. Canon 5 establishes that a lawyer should exercise independent professional judgment on behalf of a client. In particular, such judgment should be exercised "solely for the benefit of [the] client and free of compromising influences and loyalties." Ethical Consideration 5-1. Canon 9 directs that a lawyer should avoid even the appearance of professional impropriety. We will focus here on Canon 5. It states explicitly the principle that is most directly relevant to your question, namely, that an attorney should not compromise his independent professional judgment by "serving two masters" and is obligated to represent each client with undivided loyalty.

The applicable disciplinary rule, DR 5-105, reads as follows:

> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

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[2] We believe that under existing statutes the Attorney General would not have such authority. The issues surrounding the authority of the Attorney General to hire counsel outside the Department, and the Attorney General's duty to supervise litigation involving the interests of the United States, are discussed in our April 11, 1979, memorandum for the Deputy Associate Attorney General.

(B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).

(C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each.

(D) If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer affiliated with him or his firm, may accept or continue such employment.

The foregoing rule establishes a two-part analysis for determining whether, in a particular case, an exception may be made to the principle that a lawyer should not represent multiple clients with "differing interests":[3] (1) it must be "obvious" that the lawyer can "adequately" represent each client's interest, and (2) each client must consent to the representation after full disclosure of the facts. This two-part analysis is also reflected in the proposed rules of professional conduct, not yet adopted by the ABA, which were circulated at the ABA mid-winter meeting in a discussion draft dated January 30, 1980. That draft enunciates the basic principle that "a lawyer may not act as advocate against a person the lawyer represents in some other matter, even if the litigation is wholly unrelated." (*Id.* at p. 29.) The draft goes on to say, however, that ". . . there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer engaged in a suit against a large corporation with diverse operations may accept employment by the corporation in an unrelated matter if doing so will not affect the lawyer's conduct of the suit and if both the litigant and the corporation consent upon adequate disclosure." (*Id.*) Accordingly, the proposed ethical rules maintain both the requirement that dual representation would "not affect the lawyer's conduct of the suit" and, thus, that the lawyer can adequately represent the client's interests *and* the requirement that each client must consent to such representation.

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[3] The phrase, "differing interests," is defined rather broadly in the ABA Code. It includes "every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest."

The principles of Canon 5 would apply to the government's independent contractor that sought simultaneously to represent both the United States, and in other litigation another party with interests adverse to those of the United States. In such a situation, a court will consider not just whether the two matters as to which simultaneous representation is to be undertaken are substantially related, but also whether "the duty of undivided loyalty which an attorney owes to each of his clients" may be discharged. *Cinema 5, Ltd.* v. *Cinerama, Inc.*, 528 F.2d 1384, 1385-87 (2d Cir. 1976). At a minimum, a court would normally expect that participation in a lawsuit against a client, or similar adverse representation, had been fully disclosed to and consented to by all concerned clients. *See id.* at 1386; *see also IBM* v. *Levin*, 579 F.2d 271, 280 (3d Cir. 1978) (an attorney "must resolve all doubts in favor of full disclosure to a client of the facts of the attorney's concurrent representation of another client in a lawsuit against him."). Moreover, a court may well take an independent look at the underlying facts of the dual representation. As the Court of Appeals for the Second Circuit has written:

> Where the relationship is a continuing one, adverse representation is prima facie improper . . . and the attorney must be prepared to show, at the very least, that there will be no actual or *apparent* conflict in loyalties or diminution in the vigor of his representation.[4]

In view of these principles, as a practical matter two different steps would have to be taken in the present situation. First, before any private firm were retained to represent the United States in the railroad litigation, it would be necessary for the United States to know about cases—involving litigation, counseling or other aspects of representation—that the firm presently has in which the interests of the United States in the railroad litigation would be implicated. Then, each of the cases should be studied in order to determine whether the representation called for by them would make it unlikely that the private attorneys could also represent with undivided loyalty the interests of the United States in the railroad litigation. If agencies or instrumentalities of the United States other than the Department of Justice were involved in the firm's other cases, those agencies should be consulted in determining whether a conflict of interest would arise from engaging the firm in the railroad litigation.

Second, both the United States and the law firm's other present clients would have to agree to its representation of the United States in the railroad litigation. And, whenever the firm sought to engage a new client in a matter involving the United States, the firm would have an obligation to inform the United States of that fact. In that way, the United States would be able to determine whether it should continue to consent to representation by the private attorneys of its interests in the railroad litigation.

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[4] *Cinema 5, Ltd.* v. *Cinerama, Inc.*, 528 F.2d 1384, 1387 (2d Cir. 1976) (emphasis in original).

Also, the ethical constraints would not end with the termination of the railroad litigation itself. Even after the attorney-client relationship between private attorneys and the United States ended, the private attorneys would be bound not to reveal confidences of the United States gained as its lawyer. The "clearly settled test" in disqualification matters where the adverse party is the attorney's former client is the so-called "substantial relationship" test: ". . . the attorney will be disqualified if the subject matter of the two representations are 'substantially related.' " *Westinghouse Elec. Corp.* v. *Gulf Oil Corp.*, 588 F.2d 221, 223 (7th Cir. 1978); *see also T.C. & Theatre Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953). This test "embodies the substance of Canons 4 and 9 of the ABA Code of Professional Responsibility," 588 F.2d at 224. It turns on "the possibility, or appearance thereof, that confidential information might have been given to the attorney in relation to the subsequent matter in which disqualification is sought." *Id.*; *see also Westinghouse Elec. Corp.* v. *Kerr-McGee Corp.*, 580 F.2d 1311, 1322 (7th Cir. 1978).[5]

In addition to the foregoing, we think a word is in order on a related, but somewhat distinct, set of issues. There has always been in this Office a basic question whether it is appropriate for the Attorney General (or the President) to contract out the litigation responsibility of the United States. The question has both a constitutional and a policy aspect. First, on the constitutional level, we have long asserted that the making of litigation judgments (variously described as prosecutorial discretion or litigation management) is a function at the core of the President's Article II duty to take care that the laws be faithfully executed, and must, therefore, be performed by those who serve under, and are responsible ultimately to, the President. Second, on the policy level, we have enunciated the view that the performance of this function is best assured by centralizing all litigation in one agency under one Cabinet official. We have long defended the essentiality of Attorney General "supervision" and "control" of litigation involving the United States.

Of course, at the same time, this Department has often acknowledged the merit—or at least the tolerability—of allowing the independent regulatory commissions and government chartered corporations to retain independent litigating authority. (Indeed, USRA was one of these independent entities.) Our acceptance of that independence has grown out of an appreciation of the rather distinct nature of these entities; they were created by Congress to function to some extent beyond the control of the President. As long as their functions are not controllable in the normal manner by the Executive Branch, it makes at least reasonably good sense to allow their litigation judgments to go forward outside the President's and the Attorney General's control. However, the abolition of the independent entity and its incorporation into the structure of the Executive Branch would remove the only legitimate traditional reason for independent litigation responsibility.

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[5] A number of steps should also be taken by a law firm during the course of representing the United States to protect any confidences gained during that representation from other attorneys in the firm who may be involved in cases involving the United States, such as assuring that the files of the railroad case will only be accessible to certain attorneys and those attorneys will have no contacts with others in the firm with respect to other cases involving the United States.

If the USRA is to be no longer a party to the litigation, and if the United States is to be the only party having an interest in the outcome of the pending valuation cases, our knee jerk response ordinarily would be that there is no cause for having lawyers other than those supervised by the Attorney General making the litigation judgments and arguing the United States' cause in court. The question you have posed as an ethical issue has, candidly, given us considerable concern because it involves a proposal that is alien to our experience and contrary to this Department's usual stance on questions of litigation supervision. How can a lawyer represent the United States in court if he or she is not accountable to the United States? How can that lawyer divine whether the position he or she intends to take in court—both on questions of procedure and substance—is the view of the United States? At the least, unless there is central supervisory authority, the positions taken in these cases could only reflect the position of the United States *in these cases* and not in other cases litigated by this Department.

Our study of the ethical question you posed has led us to the view that the ethical inquiry inevitably merges with these overarching questions of policy. They merge for this reason: The extent to which a private lawyer or firm can both represent the United States and litigate against it may depend upon the extent to which the work done on behalf of the United States can take place in a sterile environment removed from the usual exchange of information and personal interchange that characterizes our litigation practice. That is, if the representational activity could be performed without consultation and exchange within this Department, it might be fairly easy to conclude that there is less reason to believe that client confidences will be misused or that loyalty will be undercut. The fully *independent* contractor probably fits well within that structure. Such a contractor would receive an assignment and carry it out without further input or second-guessing by the Department. Thus, if we were to retain a law firm to perform a study on behalf of the Department, the performance of that segregable activity would probably not jeopardize the firm's ability to litigate against this Department in cases unrelated to that subject matter.

The question that we find especially troubling here is whether that same firm can, realistically and consistently with our traditional understanding of the role of this Department, undertake a contract to litigate on behalf of the United States that will not force it to interact closely with this Department. If the answer is that interaction and supervision are to be anticipated, then to that extent the likelihood of ethical problems correspondingly increases. In this same vein, one additional point should be reemphasized. It will not suffice for this Department alone to make the judgments whether ethical problems appear in other cases in which the lawyer or firm may be involved. In those cases the views of our client agencies will have to be seriously evaluated, and we see no way in advance of consultation with those agencies that this Department can pass on whether disqualification would be required in some other cases.

The question you raise is obviously a difficult one, and we would not want our discussion here to suggest that the ethical dilemma presents an insurmountable obstacle. We would be pleased to address this question further as more concrete facts become available.

LARRY A. HAMMOND
Acting Assistant Attorney General
Office of Legal Counsel

APPENDIX

March 23, 1979

MEMORANDUM OPINION FOR THE DEPUTY ASSOCIATE ATTORNEY GENERAL

This responds to your request for advice regarding problems that would be raised under the conflict of interest laws in connection with a proposed temporary appointment of a lawyer (L) in private practice as a government attorney for the purpose of trying selected civil cases. You stated that a number of alternatives are being considered: service with or without compensation, on a part- or full-time basis, with or without continuing affiliation with a private firm, for a period of time of a few months to about two years. In this memorandum we discuss the principal questions raised by these alternative proposals: (1) whether the lawyer may be hired as an independent contractor rather than as a government employee; (2) the compensation he can be paid; (3) the extent to which his disqualification would be necessary pursuant to 18 U.S.C. § 208; (4) other limitations applicable to the lawyer and his partners during the lawyer's tenure with the government; (5) restrictions on post-employment activities applicable to the lawyer and his partners; and (6) issues raised under the ABA Code of Professional Responsibility in connection with the proposed appointment. As you know, and as our comments in this memorandum demonstrate, the relevant federal personnel, conflict of interest, and ethical requirements constitute a formidable body of regulation. In our work in these areas we have frequently found that there is no reasonable substitute for careful case-by-case assessments. At the level of generality called for by your request we can do little more than identify the major considerations and suggest how they have been resolved in the past. We would, of course, be pleased to elaborate on any of these matters, or to provide specific advice on any particular arrangements as you may deem helpful.

1. Independent Contractor or Government Employee

Officers and employees in the Executive Branch are covered by the conflict of interest laws; independent contractors are not. One who in fact will serve as a government employee may not, however, be hired as an independent contractor to avoid the application of the conflict of interest laws. The terms "officer" and "employee" are not defined in the conflict of interest laws themselves. The definitions of these terms provided by §§ 2104 and 2105 of Title 5 are ordinarily referred to for guidance. Three elements are regarded as having critical significance: (1) appointment in the civil service by one of the federal officers or employees specified; (2) performance of a federal function under authority of law or an "executive act";[1] and (3) supervision by a federal official of the performance of the duties of the position.[2] In this case, L would seem plainly to be an employee: he would be formally appointed, would perform services ordinarily performed by Department employees pursuant to 28 U.S.C. § 516,[3] and would be under the supervision of Department officials who would remain responsible for the conduct of the litigation in question.[4] In addition, § 516 of Title 28 reserves to "officers" of the Department of Justice the authority to conduct litigation in which the United States is a party. For both these reasons, we believe L must be appointed as an employee, rather than as an independent contractor.

2. Compensation

We assume that L would be employed on a temporary basis either as a Special Assistant United States Attorney pursuant to 28 U.S.C. § 543, or as a special attorney or special assistant to the Attorney General pursuant to 28 U.S.C. § 515(b).[5] If appointed as a Special Assistant

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[1] The meaning of the phrase "executive act," used in 5 U.S.C. § 2105(a)(2), is unclear. Performance of executive functions would, however, clearly come within the terms of the statute.

[2] The Civil Service Commission has developed a more lengthy list of indicia of employee status: service under the supervision of a federal employee; work in government space with government equipment; access to government files; handling of specific agency problems; service on more than one occasion on the same project; work on dates and hours required to be reported to the agency. *See* Federal Personnel Manual, ch. 304. *See also Lodge 1858, Am. Fed. of Gov't Emp.* v. *Administrator, NASA*, 424 F. Supp. 186 (D.D.C. 1976); B. Manning, *Federal Conflict of Interest Law* 27–34 (1964).

[3] He would not, therefore, qualify as an expert or a consultant whose services may be procured by contract pursuant to 5 U.S.C. § 3109 as authorized by § 4(c), Department of Justice Appropriation Authorization Act, Fiscal Year 1979, Pub. L. No. 95–624, 92 Stat. 3459, 3462.

[4] The Comptroller General has recognized that notwithstanding the general rule that purely personal services must be performed by regular government employees, there may be unusual circumstances where—because of the nature of the work or the existence of conditions not permitting its performance in the usual manner (such as where regular employees are not qualified or are not available)—contracting for personal services may be permitted. Such circumstances exist where, in order to avoid the appearance of conflict of interest, it becomes necessary to retain private counsel to defend a federal employee sued in his individual, rather than official, capacity in a civil proceeding which arises out of his performance of official duties at the same time that the employee is the target of a criminal investigation concerning the act or acts for which he seeks representation. *See* 28 C.F.R. §§ 50.15, 50.16 (1978). No such unusual circumstances appear to exist in the instant case.

[5] Notwithstanding the existence of this authority, government-wide limitations on hiring may be in effect at the time of the proposed appointment. A general freeze on permanent hiring could continue in effect in order to implement the requirements of § 311(a) of the Civil Service Reform Act of 1978, Public Law No. 95–454, 92 Stat. 1111, 1153, which provides that the total number of federal civilian employees on September 30, 1979, may not exceed the number on September 30, 1977. Temporary hiring may not be used to circumvent such a freeze. *See* OMB Bulletin 79-2, ¶ 3, (October 27, 1978). In addition, it is noteworthy that the employment ceiling on total employees, imposed by OMB on each agency, encompasses temporary employees.

United States Attorney, L's salary would be administratively determined pursuant to 28 U.S.C. § 548. Because of the ceiling now imposed by 5 U.S.C. § 5308, the maximum per diem rate paid Special Assistant United States Attorneys is $182. Since no minimum salary is established by law for such positions, L might also be appointed without compensation should he so desire.[6] If appointed as a special assistant or special attorney, L could be paid an annual salary fixed by the Attorney General at not more than $12,000. 28 U.S.C. § 515(b). We have previously opined that this provision permits compensation at a per diem rate of 1/360 of $12,000, rather than payment at a greater rate so long as his total compensation for the year does not exceed the $12,000 ceiling. Like § 543, § 515(b) does not establish a minimum salary; service without compensation would thus for similar reasons be permissible.

Whether additional payments may be made by his firm to supplement L's government salary, and the extent to which compensation reflecting his or his partners' earnings unrelated to his government service may be received by him to supplement his government salary, depends on whether L will qualify as a special government employee within the terms of § 202(a) of Title 18. The term "special Government employee" is there defined to include "an officer or employee of the executive or legislative branch of the United States Government, . . . who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days in any period of three hundred and sixty-five days, temporary duties either on a full-time or intermittent basis." For an individual to be appointed as a special government employee, the Department must in good faith estimate in advance of the appointment that he will serve for no more than 130 days in the 365-day period beginning on the day of his appointment. In estimating the number of days to be served, a part of a day must be counted as a full day, and a Saturday, Sunday, or holiday on which duties are to be performed must be counted equally with a regular work day. Federal Personnel Manual, ch. 735, Appendix C. If an employee does, however, serve for more than 130 days in a 365-day period, he will nevertheless continue to be regarded as a special government employee so long as the original estimate was made in good faith. *Id.* Once an individual is appointed as a special government employee, the restrictions imposed by the conflict of interest laws apply even on days he does not serve the government. *Id.*

Sections 203 and 209 of Title 18 limit the compensation employees may receive in addition to their government salary. Section 209, which prohibits receipt or payment of any salary, contribution to or supplementation of salary as compensation for an employee's services as an employee of the Executive Branch, is expressly not applicable to special government employees. 18 U.S.C. § 209(c). Section 203 prohibits receipt or payment of any compensation for services rendered or to be rendered either by a special government employee currently employed in the Executive Branch or by "another" (such as his law partner) only in relation to a particular matter involving a specific party or parties in which he has at any time participated personally and substantially as a government employee or which is pending in the department in which he is serving. Moreover, the Department-wide ban applies only where he has served in the Department for at least 61 days during the immediately proceeding 365 days. A special government employee would therefore be free to receive and to share in fees generated by his partners except as to a limited class of matters such as, for example, representation in connection with a criminal investigation that has not yet resulted in an indictment and is therefore still pending in the Department. Section 203 does not, however, bar receipt of fees in relation to representation before the federal courts even though the matter may incidentally be pending in the Department because of the Department's role in the court proceeding.

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[6] Section 665(b) of title 31 prohibits the acceptance of "voluntary service." This prohibition was not intended to preclude acceptance of "gratuitous" services rendered in an official capacity under regular appointment otherwise permitted by law to be nonsalaried where an agreement is reached prior to appointment that the employee is to serve without compensation. 30 Op. Att'y Gen. 51 (1913).

Broader restrictions on receipt of outside compensation would apply if L does not qualify as a special government employee, i.e., if he would be a regular employee. If L were to serve without compensation, § 209 would still be inapplicable. 18 U.S.C. § 209(c). However, § 203 would prohibit receipt or payment of compensation for any services rendered or to be rendered by another before any department, agency, court-martial, officer, civil, military or naval commission in relation to any particular matter in which the United States is a party or has a direct and substantial interest. L could not, therefore, share in fees for representational services rendered under such circumstances. While he could share in fees received by his partners for services rendered in court,[7] he could not himself act as agent or attorney for anyone in court in connection with any particular matter in which the United States is a party or has a substantial interest.[8] Thus his income would be limited accordingly.[9]

Finally, if L is a regular employee, but does receive compensation from the government for his efforts, he would be subject both to the restrictions imposed by § 209 and those imposed by § 203. He thus could not receive supplemental compensation from his firm for performing his government job. And if he were to work for the government on a full-time basis, he would probably be treated by the firm as having gone on a leave of absence from the firm and hence would be barred altogether from sharing in firm profits unless under established firm policy persons having such a status would be entitled to certain compensation regardless of their efforts on behalf of the firm. If L as a regular employee were to work only part-time for the government, an even more knotty problem of accounting would be posed. To satisfy the requirements of § 209, his share in firm profits would have to be reduced to reflect his more limited participation in the firm's business; to satisfy § 203, his share would have to be further reduced in light of his inability to share in fees for representational services performed by another as outlined above.[10] Perhaps the most workable solution to this problem would be for L to receive a salary reflecting the value of services he would render to the firm while working on a part-time basis. Any definite conclusion as to the compensation that might be received in these circumstances must, in any event, be deferred until more specific facts are presented.

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[7] He could not, however, receive any gratuity, or any share of or interest in any claim against the United States in consideration of assistance in the prosecution for such claim. 18 U.S.C. § 205(1).

[8] 18 U.S.C. § 205(2).

[9] Department regulations also prohibit private professional practice by other than special government employees. 28 C.F.R. 45.735-9(a) (1978). This requirement has been interpreted to require regular government employees to resign from private practice during their period of government service. The Associate Attorney General may make exceptions to this requirement in unusual circumstances. 28 C.F.R. 45.735(c) (1978). Outside employment that would interfere with the proper performance of an employee's duties, create or appear to create a conflict of interest, or reflect adversely on the Department of Justice, is in any event barred. 28 C.F.R. 45.735-9(d) (1978).

3. Disqualification Pursuant to Section 208

The feasibility of your proposal may well ultimately turn on the application of § 208 of Title 18 to the facts of each particular case. Section 208 requires an officer or employee (including a special government employee) to disqualify himself from participating in decisions with regard to particular matters where he, his spouse, minor child, partner, organization in which he is serving as officer, director, trustee, partner or employee or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment has a financial interest. So long as L is affiliated with his firm,[11] and the firm, through its representation of certain clients, has a financial interest in decisions he might make in the course of his government service, disqualification would be necessary unless a waiver could be obtained under § 208(b).[12] A waiver is available on an *ad hoc* basis where an employee receives in advance a written determination that the interest is not so substantial as to be deemed likely to affect the integrity of the services which the government may expect from that employee. Decisions in the situation you have described would not, however, appear to fall within this *de minimus* exception at least where clients of a major law firm are involved. Careful consideration would therefore have to be given to the circumstances in which decisions by L in the course of his government employment would affect clients of his firm, and thus, the financial interests of himself or his partners. Although § 208 does not, in terms, prohibit an individual's appointment, if disqualification will frequently be required, the appointment may at the outset be futile.

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[10] He could, however, continue to participate in bona fide pension, retirement, group life, health, or accident insurance, profit-sharing, stock bonus, or other employee welfare or benefit plans. 18 U.S.C. § 209(b).

[11] A leave of absence is regarded as a continuation of employment within the terms of § 208.

[12] Thus, where his law partner performs a significant amount of work on behalf of client X, L would be required to refrain from participating in a decision that would significantly affect client X's business.

4. Other Restrictions Under the Conflict of Interest Laws Applicable During Government Tenure

a. *Restrictions on L.* We have previously discussed the restrictions on receipt of compensation and on participation in decisions affecting a personal financial interest, and have briefly alluded to the prohibition on certain activities of government employees imposed by § 205. If L is a special government employee who serves for at least 61 days, he will be barred by § 205 from acting as attorney or agent in relation to any particular matter involving a specific party or parties in which he has at any time participated in the course of his government service, or which is pending in the department in which he is serving. He would not otherwise be barred from acting as an attorney in court proceedings or in proceedings before other agencies. If he does not qualify as a special government employee, he must refrain from acting as agent or attorney for anyone before any department, agency, court, court-martial, officer or any civil, military or naval commission in connection with any particular matter in which the United States is a party or has a direct and substantial interest.

b. *Restrictions on L's partners.* L's partners are precluded from acting as agents or attorneys for anyone other than the United States in connection with any judicial proceeding or other particular matter in which the United States is a party or has a direct and substantial interest and in which L participates or has participated personally and substantially as a government employee, or which is under his official responsibility.[13] This bar is only effective during the period in which L serves as a government employee. Thus, if L remains affiliated with his firm, the firm may not, during his tenure with the government, participate as attorney for parties to the litigation in which L is involved. L's partners may not be charged on an imputation theory of wrongdoing in violation of §§ 203 and 205.[14]

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[13] 18 U.S.C. § 207(c), redesignated as § 207(g), effective July 1, 1979.

[14] The obligations directly imposed on L's partners to observe the prohibitions against providing L with outside compensation are discussed above.

5. Post-employment Restrictions

We assume that L, if appointed, will leave government service some time after the July 1 effective date of the recent amendments to § 207 of Title 18. Unless he is designated for coverage under § 207(d),[15] he would not be subject to the aiding and assisting bar of § 207(b)(ii) and the 1-year bar on contacts with the Department under § 207(c). He would, however, be permanently barred from acting as attorney or agent or otherwise representing any person other than the United States in making any communication, with intent to influence, to or in making any formal or informal appearance before any department or court in relation to any particular matter in which the United States or the District of Columbia is a party or has a direct and substantial interest and in which he participated personally and substantially. He would also be prohibited for 2 years from acting as agent or attorney in similar circumstances with regard to matters under his official responsibility during the last year of his government service. In all likelihood, L's realm of official responsibility will be no broader than the matter in which he participates personally and substantially, and he will essentially be barred simply from switching sides in the case in which he served as government counsel and in closely related cases.

Ethical obligations, rather than statutory requirements, are the source of the principal restrictions applicable to L's partners during the post-employment period.

6. Ethical Constraints

While we will touch here briefly upon ethical constraints that may be of significance, you should be aware that a general discussion of this sort is of limited value and adequate guidance can only be given where reference can be made to particular facts and circumstances.

a. *Restraints on L's service with the government.* If L or his firm has previously represented any of the defendants in the case he will be trying for the government, he may be subject to a motion to disqualify based on the American Bar Association's Canon 4 directive to preserve the secrets and confidences of a client unless he could demonstrate that he never received confidential information in a case substantially related to the case he handles for the government. Even were the former client to waive such disqualification, a question would be presented whether the United States should accept such a waiver, particularly in a case in which the United States is suing the client, since the government should be above reproach and should avoid even the appearance of impropriety.

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[15] Persons paid at the executive level are automatically covered. Those paid at a rate of GS-17 or above who have significant decisionmaking or supervisory responsibility and others in positions with comparable decisionmaking authority are to be designated for coverage by the Director of the Office of Government Ethics.

b. *Restraints on L's firm following his service with the government.* Following his government service, L would be obliged, pursuant to DR 9-101(B) of the ABA Code of Professional Responsibility, to decline private employment in a matter in which he had substantial responsibility while he was a public employee. His disqualification would also be imputed to his firm pursuant to DR 5-105(D) of the ABA Code of Professional Responsibility. This Department has taken the position, approved in ABA Formal Opinion 342, that the disqualification of a firm may be waived by the government whenever effective screening measures by the firm will effectively isolate the lawyer who is personally barred from participating in the particular matter and sharing in the fees attributable to it, so long as there is no appearance of significant impropriety affecting the interests of the government.[16]

7. Conclusions

The above discussion has necessarily been rather general in nature. Should you determine that as a policy matter appointment of L would be appropriate, a more detailed review of the conflict of interest problems likely to be presented would certainly be advisable. For present purposes, however, the following conclusions are perhaps the most significant.

a. L could be appointed as a Special Assistant United States Attorney to be paid at a per diem rate of up to $182. If he is appointed as a special government employee or serves without compensation, his firm may supplement his salary.

b. For L to qualify as a special government employee the Department would be required to estimate in good faith that he would serve the government on no more than 130 out of the 365 consecutive days beginning with the day of his appointment. Days on which only part of his time was devoted to government service would count as days worked for purposes of this estimate.

c. Unless L qualifies as a special government employee, he may as a regular employee be required significantly to limit his activities in private practice pursuant to 18 U.S.C. §§ 203 and 205.

d. Depending on the facts of the case on which L will be working and the clients of the firm with which he is affiliated, L may be seriously handicapped in his performance of his governmental duties because of his obligation under § 208 to refrain from participating in decisions with regard to a matter in which he or his partners have a financial interest or in which his law firm has a financial interest because of it representation of a party in the matter. If so, he should probably not be appointed.

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[16] The currently pending proposal for revision of the District of Columbia Bar's Code of Professional Responsibility also addresses this question.

e. L may not subsequently serve as agent or attorney in a particular matter in which he personally and substantially participated while in the government.

f. During L's tenure with the government, L's partners are barred from serving as attorneys in a particular matter in which L participates personally and substantially. Following his return to private practice, their obligations would be ethical in nature.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

Authority of Indian Tribal Court to Issue Garnishment Writs Under 42 U.S.C. § 662(e)

An Indian tribal court is a "court of competent jurisdiction" for purposes of issuing garnishment writs under 42 U.S.C. § 662(e), if it has the power under tribal law to issue judgments awarding child support or alimony.

February 28, 1980

MEMORANDUM OPINION FOR THE ASSOCIATE GENERAL COUNSEL, OFFICE OF PERSONNEL MANAGEMENT

This responds to your request for our opinion whether the Yakima Indian Nation Tribal Court is a "court of competent jurisdiction" for purposes of 42 U.S.C. § 662(e), as implemented by the Office of Personnel Management's proposed regulations. 44 Fed. Reg. 60301 (1979) (to be codified in 5 C.F.R. 581.101–581.501). In our opinion, a tribal court that establishes garnishment procedures may qualify as a court of competent jurisdiction if it had the power to issue the underlying judgment awarding child support or alimony. Absent the facts of a particular case, we do not decide whether any particular tribal court is a "court of competent jurisdiction."

In 1975, Congress waived the sovereign immunity of the United States in proceedings for enforcement of writs of garnishment issued to enforce orders for child support or alimony. Pub. L. No. 93-647, § 101(a), 88 Stat. 2357, 42 U.S.C. § 659. Prior to that Act, the pay of federal employees was not subject to attachment for purposes of enforcing court orders, including orders for child support and alimony. *See Buchanan* v. *Alexander,* 45 U.S. (4 How.) 20 (1846); *Applegate* v. *Applegate,* 39 F. Supp. 887, 889–90 (E.D. Va. 1941). Reflecting the "importance the Congress attributes to support payments," a bill recommended by the Senate Committee on Finance in 1975 provided that the money "based upon remuneration for employment" of federal employees, including military personnel, would be subject to garnishment in support and alimony cases. S. Rep. No. 1356, 93d Cong., 2d Sess. 53–54 (1974). The conference committee adopted this language. H.R. Rep. No. 1643, 93d Cong., 2d Sess. 23 (1974). As enacted, this provision states:

> Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or

> payable by, the United States (including any agency or instrumentality thereof and any wholly owned Federal corporation) to an individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments.

42 U.S.C. § 659. "Legal process" was not defined in the Act.

In 1977, Congress clarified this law by authorizing the issuance of regulations to administer the law, providing specific conditions and procedures, and defining the terms used in the garnishment statute. 42 U.S.C. §§ 661-662. *See* H.R. Rep. No. 263, 95th Cong., 1st Sess. 35 (1977). It defined legal process as follows:

> The term "legal process" means any writ, order, summons, or other similar process in the nature of garnishment, which—
>
> (1) is issued by (A) a court of competent jurisdiction within any State, territory, or possession of the United States, (B) a court of competent jurisdiction in any foreign country . . . , or (C) an authorized official pursuant to an order of such a court of competent jurisdiction or pursuant to State or local law, and
>
> (2) is directed to, and the purpose of which is to compel, a governmental entity, which holds moneys which are otherwise payable to an individual, to make a payment from such moneys to another party in order to satisfy a legal obligation of such individual to provide child support or make alimony payments.

42 U.S.C. § 662(e) (1976 ed., Supp. IV 1980). The question posed is whether an Indian tribal court is a "court of competent jurisdiction" for the purposes of this section.

Garnishment is a purely statutory proceeding. *See, e.g., Farmers Ins. Exchange* v. *Ledesma,* 214 F.2d 495, 497-98 (10th Cir. 1954); *Mahomet* v. *Hartford Ins. Co.,* 3 Wash. App. 560, 477 P.2d 191 (1970). The federal statute allowing garnishment of federal wages does not create a right of action, it merely waives sovereign immunity and allows enforcement pursuant to laws governing the court in question. *Kelley* v. *Kelley,* 425 F. Supp. 181, 183 (W.D. La. 1977); *Harris* v. *Harris,* 40 N.C. App. 26, 252 S.E.2d 95, 96-97 (1979). Accordingly, it has been held that a right to subject an employee's wages to the claims of the plaintiff must exist under state law. *Diaz* v. *Diaz,* 568 F.2d 1061, 1063 n.1 (4th Cir. 1977). A tribal court can be a court of competent jurisdiction for purposes of issuing garnishment writs, therefore, only if tribal law creates a right of garnishment.

A writ of garnishment for purposes of § 659 must be based on a valid judgment that the funds are due and owing to the plaintiff. Accordingly, the court issuing the underlying judgment must have had both subject matter jurisdiction and personal jurisdiction over the parties. It is clear that many tribal courts, including the Yakima Indian Nation Tribal Court, are courts of competent jurisdiction in domestic relations cases. *Confederated Tribes and Bands of the Yakima Indian Nation* v. *Washington,* 608 F.2d 750, 752 (9th Cir. 1979). It has been held that the power to regulate the domestic relations of its members is among the powers which tribes possess by virtue of their quasi-sovereign status. *See Fisher* v. *District Court,* 424 U.S. 382, 390 (1976); *United States* v. *Quiver,* 241 U.S. 602, 603–04 (1916); *Conroy* v. *Conroy,* 575 F.2d 175, 181–82 (8th Cir. 1978). In *Fisher,* the Court ruled that tribal jurisdiction over a proceeding for adoption, by Indians, of a son of Indian parents, where all parties resided on the reservation, was exclusive. 424 U.S. at 389. In *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 65 (1978), the Court noted that tribal courts have repeatedly been recognized as appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians.

In light of these holdings, it must be recognized that many tribal courts are courts of competent jurisdiction for purposes of alimony and child support decrees. The federal garnishment statute, which defines "child support" and "alimony," refers to judgments "issued in accordance with applicable *State* law by a court of competent jurisdiction." 42 U.S.C. § 662(b) and (c) (1976 ed., Supp. IV 1980) (emphasis added). We do not read this definition to exclude tribal court judgments, however. There is no evidence that Congress meant to exclude tribal law. The committee reports cited above do not discuss the question of tribal court jurisdiction. It is likely that the issue simply did not arise. The intent of the law, however, was to remove a barrier against garnishment of federal wages where a valid judgment decreed that alimony or child support was due. *See* S. Rep. No. 1356, 93d Cong., 2d Sess. 53–54 (1974). It would defeat the intent of the law, and undermine the integrity of tribal court judgments, to refuse to recognize them as valid judgments under the garnishment statute.

In sum, we see no legitimate basis either for denying the benefits of the federal wage garnishment law to Indian litigants or for requiring them to seek a garnishment writ in state courts. If the tribal court had jurisdiction over the underlying suit, and if a garnishment right is created by tribal law, then the tribal court should be considered a court of competent jurisdiction for purposes of 42 U.S.C. § 662(e) (1976 ed., Supp. IV 1980).

We note that we do not intend to suggest that the federal garnishee or its agents must examine the jurisdictional basis for the underlying judgment. Section 659(f) provides:

> Neither the United States, any disbursing officer, nor governmental entity shall be liable with respect to any payment made from moneys due or payable from the United States to any individual pursuant to legal process regular on its face, if such payment is made in accordance with this section and the regulations issued to carry out this section.

Federal courts have refused to entertain suits against federal defendants filed by plaintiffs alleging that the defendants recognized invalid state court judgments. *Overman* v. *United States*, 563 F.2d 1287, 1291–92 (8th Cir. 1977) (held that waiver of sovereign immunity did not include suit against United States to challenge validity of garnishment based on allegedly fraudulent divorce decree); *Jizmerjian* v. *Department of the Air Force*, 457 F. Supp. 820, 823–24 (D.S.C. 1978) (held that 42 U.S.C. § 659(f) insulates the United States from suit challenging garnishment based on allegedly invalid alimony decree). If the garnishment is pursuant to "legal process regular on its face," and the federal statute and regulations are followed, you need inquire no further.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

Effect of 18 U.S.C. § 600 on Proposal for Hiring Census Enumerators

Proposal to give preference for hiring as census enumerators to persons recommended by Democratic Party leaders does not violate 18 U.S.C. § 600, which punishes those who promise federal employment or benefits as an enticement to or reward for future political activity, but does not prohibit rewards for past political activity.

Even if § 600 were read to prohibit a promise of employment or benefits as a reward for past political activity, under the proposed program neither Democratic Party leaders nor any potential census enumerators are being made such a promise.

February 28, 1980

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

The White House Counsel's Office has forwarded for our approval two memoranda to be distributed respectively to Census Bureau officials responsible for hiring enumerators and to Democratic Party officials whose recommendations will be sought. These memoranda provide that Democratic Party leaders will be one of several sources that the Census Bureau will use in compiling lists of names from which to hire enumerators. The candidates nominated by party leaders will receive a preference; in this way the memoranda continue the program of selecting census enumerators in its traditional, historically established form. We believe that distributing these memoranda will not violate 18 U.S.C. § 600, and that no one will violate 18 U.S.C. § 600 by following the instructions given in these memoranda.

I. Analysis

18 U.S.C. § 600 provides:

> Whoever, directly or indirectly, promises any employment, position, compensation, contract, appointment, or other benefit, provided for or made possible in whole or in part by any Act of Congress, or any special consideration in obtaining any such benefit, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in connection with any general or special election to any political office, or in connection

> with any primary election or political convention or caucus held to select candidates for any political office, shall be fined not more than $10,000 or imprisoned not more than one year, or both.

It is our view that § 600, a criminal statute, does not flatly prohibit government decisionmakers from considering the political consequences of their actions in deciding how to administer federal programs. In our opinion, the only way § 600 might be violated in the program at hand is if people were promised employment or special consideration for employment as census enumerators as an enticement or reward for future political activity or support of a party or candidate; § 600 cannot be read to prohibit rewards for past political activity.[1] We believe this interpretation of the statute is correct for several reasons.

Section 600 punishes only a person who promises a benefit in return for political support or activity; it conspicuously does not make it illegal simply to grant a benefit. While it is possible to read § 600 to apply to a promise given as a reward for political activity done in the past, such a reading is illogical. There is no reason for Congress to have distinguished between promising a benefit in return for past political support or activity and actually conferring that benefit; indeed, the two acts may often be indistinguishable in practice. Since granting benefits in return for past support was a widespread, well-established practice, and since the language of § 600 clearly stops short of prohibiting that act, we think Congress could not have intended to prohibit the indistinguishable—both as a matter of policy and, often, as a matter of fact—act of giving a promise in return for past political activity. Instead, we believe it only logical to conclude that Congress was concerned with eliminating the use of federal funds as an enticement for future political support.

If § 600 is interpreted in this way, the program outlined in the proposed memoranda is clearly consistent with it. The people whom Democratic leaders nominate or refer are, of course, being given "special consideration in obtaining [a] benefit" provided for by an Act of Congress. But those people are not being promised such special consideration to induce political activity or support. By telling Democratic leaders not to link referrals to political activity, the Bureau is attempting to ensure as best it can that these leaders will not use their power to obtain special consideration as a way to reward party workers for their activity. Telling Census Bureau workers to give party leaders this instruction also makes it clear that the Bureau's policy is not itself an indirect way of promising employment or special consideration in return for political activity. Of course, if a party official does promise employment as a census enumerator, or special consideration in obtaining such employment, in return for future political activity or support by the promisee, that official will be subject to possible criminal liability. Such an official would not, however, be acting in accordance with the Administration's program.

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[1] The legislative history of the companion statute, 18 U.S.C. § 601, prohibiting the deprivation of employment for political contribution, supports this limited interpretation of the statutes. For example, the Senate report on § 601 states that it is designed to "prohibit actual, attempted, or threatened deprivation of public employment or benefit as a means of *extorting* a political contribution of a thing of value . . ." S. Rep. No. 1245, 94th Cong., 2d Sess. 4 (1976) (emphasis added).

Even if § 600 were read to prohibit promises made in return for past political activity, we believe that the program outlined in the proposed memoranda still would not violate that provision. The policy expressed in the memoranda, undoubtedly, does give Democratic Party leaders some privilege; but it does not give those leaders "any employment, position, compensation, contract, appointment, or other benefit, provided for or made possible in whole or in part by any Act of Congress, or any special consideration in obtaining any such benefit"—the benefits to which § 600 applies. Democratic Party leaders are being given only the opportunity to nominate preferred candidates for positions as enumerators. This opportunity is not among those benefits that, under § 600, cannot be distributed in return for support of a political party. That is, the party leaders are not themselves receiving a covered benefit. There is a clear distinction between receiving employment or special consideration for employment oneself, and receiving the power to award special consideration for employment to others. Because both sorts of privileges were historically involved in political patronage, we believe that Congress would have specified both if it had intended such a sweeping restriction. Instead, the statute lists benefits of a specific nature; because § 600 is a criminal statute, we believe that list must be literally construed and is exclusive.

Finally, we believe that, even if § 600 were read to prohibit a promise of employment or special consideration as a reward for past political support, the potential enumerators are not being made such a promise in violation of § 600. The proposed memoranda would instruct party leaders not to make their recommendations as a reward for political activity or support, but rather to recommend qualified individuals.

Larry A. Hammond
Deputy Assistant Attorney General
Office of Legal Counsel

History of Appointments to the Supreme Court

[The memorandum which follows, prepared by the Office of Legal Counsel at the request of the Attorney General, surveys four general aspects of the process of appointing Justices of the Supreme Court: (1) the qualities Presidents have sought in Supreme Court nominees; (2) the process of recruiting and evaluating potential appointees prior to nomination; (3) the manner in which the Senate fulfills its responsibilities in the appointment process; and (4) the relationship between the process of choosing a candidate and a successful candidate's eventual performance on the Court. The memorandum pays special attention to the roles played in the appointment process by the Attorney General and the Department of Justice.]

March 5, 1980

MEMORANDUM FOR THE ATTORNEY GENERAL

I. Introduction

Aspirants to the Supreme Court, unlike presidential, vice-presidential, and congressional candidates, are subject to no constitutional limitations regarding age, citizenship, or residency. No statute requires that Justices even be lawyers, although every nominee so far has met this criterion. Congress has considered bills to limit Supreme Court appointments either to persons under a particular age or to candidates with prior judicial experience; no such limitation has ever been enacted. The history of Supreme Court appointments is consequently a history of presidential discretion limited formally only by the Senate confirmation process, which also proceeds without direct constitutional guidance.

In response to your request, this Office has surveyed some of the vast literature relevant to the history of Supreme Court appointments.[1] We have addressed four general questions: What qualities have Presidents sought in Supreme Court nominees? How are potential appointees recruited and evaluated prior to nomination? How does the Senate fulfill its responsibilities in the appointment process? Is there a predictable relationship between the process of choosing a candidate and a successful candidate's eventual performance on the Court? In surveying the history of nominations and appointments, we have paid special attention to the roles played in these processes by the Attorney General and the Department of Justice.

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[1] Secondary sources are cited in footnotes by author and page number; a bibliography indicating the full citation for each source is appended to this memorandum. We found the most useful general review of the history of Supreme Court appointments to be H. Abraham, Justices and Presidents: A Political History of Appointments to the Supreme Court (1974).

No one formula for choosing the "best" Supreme Court Justice can be deduced from a historical survey. Who are the best candidates with respect to any particular vacancy will depend on a host of factors, including the President's political philosophy, his perceptions of the role of the Court in American government, the crucial issues facing the nation at a given moment in history, and the Court's changing institutional needs. Neither can a Justice's post-appointment performance be predicted with entire confidence based on his pre-appointment career. The uniqueness of the Court's institutional role, the wide range of vital questions that the Justices adjudicate, and the need for each Justice to collaborate with eight others in reaching what often are controversial results, all necessarily affect any appointee's eventual record in the decision of cases. The aim of this memorandum is consequently not to elaborate, in any definitive way, how a great Justice might now be chosen; its aim is to identify the range of issues of which the President at least ought to be aware in exercising his discretion, and which this Department should consider if it is to be helpful in the appointment process.

II. The Presidents' Criteria

Under Article II, § 2, clause 2 of the Constitution, the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . judges of the Supreme Court. . . ." All but four Presidents—the exceptions so far including President Carter—have successfully nominated at least one Supreme Court Justice. Presidents have sometimes made their selection criteria explicit. George Washington, for example, insisted on support of the Constitution, distinguished Revolutionary service, active political involvement, prior judicial experience, geographic "suitability," and either a good general reputation or personal ties with the President himself.[2] More often, the criteria have been tacit and ad hoc. It is possible, however, based on the history of, 104 successful Court appointments,[3] to examine certain factors that have weighed to some degree in all nominations.

A. Ability and Character

President Herbert Hoover asserted that his Supreme Court appointees were "chosen solely on the basis of character and mental power," [4] and every President, in explaining his nominations publicly, has cited ability and character among his criteria for selection. Some minimum of each is thus a *sine qua non* for a successful appointment. The appropriate measure of "objective" merit, however, especially regarding judicial ability, may vary with the needs of the country and of the Court when a vacancy occurs. With respect to some appointments, the Court's greatest need may be an exceptional intellectual leader, with or without extensive political or administrative experience. At other times, the Court may need a catalytic administrator or an effective advocate more than it needs a truly brilliant thinker. An ideal candidate, of course, would be both intellectually gifted and politically effective; the balance of these talents is likely, however, to vary even within the pool of the nation's best candidates.

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[2] Abraham at 64.

[3] The 104 successful appointments include three successful "promotions" of Associate Justices to the post of Chief Justice. The total number of persons to have served so far in the Court is 101. Abraham at 46–47.

[4] Teger at 46.

Because the number of capable individuals is much greater inevitably than the number of places to be filled, few nominations have occurred in which a candidate's outstanding ability alone appears to have decided his nomination. There are, however, exceptions. Although President Hoover wanted a "non-controversial western Republican" to succeed Oliver Wendell Holmes,[5] he was persuaded by a long list of labor and business leaders, scholars, and Senators that Chief Judge Benjamin N. Cardozo of the New York Court of Appeals was the only fit successor. The final straw breaking Hoover's resistance appears to have been the emphatic endorsement of Senator William E. Borah of Idaho, the Republican chairman of the Foreign Relations Committee, who reportedly told Hoover, "Cardozo belongs as much to Idaho as to New York," and "[g]eography should no more bar the judge than the presence of two Virginians—John Blair and Bushrod Washington—should have kept President Adams from naming John Marshall to be Chief Justice." [6] When reminded that a Jewish Justice, Louis Brandeis, already sat on the Court, Borah said, "Anyone who raises the question of race [sic] is unfit to advise you concerning so important a matter." [7] A similar chorus of support induced President Roosevelt to appoint Felix Frankfurter as Cardozo's successor. Roosevelt, like Hoover, wanted a Westerner on the Court, although, had he found one to succeed Cardozo, Frankfurter—already a Roosevelt adviser—likely would have received a subsequent Roosevelt nomination.

Not only is objective merit rarely the decisive criterion, but some of the nation's greatest Justices were apparently chosen without obvious primary regard for their intellectual potential. Joseph Story, for example, who probably ranks second only to John Marshall in his impact on American law, was the fourth nomination submitted by President Madison for the seat after two confirmed appointees (Levi Lincoln and John Quincy Adams) had declined the position and a third nominee had been rejected by the Senate. In the end, it is uncertain what led Madison to Story, although it is known that Story's uncle was a close friend of the President.[8]

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[5] Abraham at 191.

[6] Abraham at 192.

[7] Abraham at 192.

Conversely, some candidates whose pre-appointment careers promised considerable success based on objective merit performed with little distinction once appointed. The clearest recent example is Charles Evan Whittaker, an outstanding commercial lawyer from Missouri, who had served briefly on both the U.S. District Court and Court of Appeals, and who had won the strong support of Attorney General Brownell. President Eisenhower appointed Whittaker to the Supreme Court in 1957; he resigned 5 years later with few significant Supreme Court opinions to his credit.[9]

To a President interested in demonstrated merit, prior judicial experience may appear a useful index. Fifty-eight of the 101 individuals to serve on the Supreme Court had served earlier on a state or on a lower federal tribunal. This asset, in this century, appears to have appealed more to Republican than to Democratic Presidents. Of the 23 individuals with prior judicial experience appointed to the Supreme Court since 1900, only eight were appointed by Democrats, although, of the 44 persons named to the Court in this century, Democrats have named 18. The 43 persons to serve without prior judicial experience on the Supreme Court since its inception include John Marshall, Joseph Story, Roger Taney, Charles Evans Hughes, Louis Brandeis, Harlan Fiske Stone (when appointed Associate Justice), Felix Frankfurter, William Douglas, Robert Jackson, and Earl Warren—a list that clearly demonstrates the absence of any necessary correlation between judicial experience and capacity for distinguished service.

Presidents have not viewed judicial service as a prerequisite to nomination. However, all but one of the 101 persons to sit on the Court reached the Court after careers in politics or public service of some sort.[10] Although a record of judicial service may be helpful in facilitating an assessment of a candidate's performance as a legal thinker, Presidents appear historically to have been at least as concerned with a person's demonstrated acquaintance with the nation's needs and public processes, and sustained prior exposure to the pressures of public life. Some history of functioning in a pressurized environment may help assure that a nominee's effectiveness and independence on the Court will not be overcome by public criticism or the magnitude of the issues that the Court confronts.

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[8] Abraham at 79–81.

[9] Abraham at 247–48.

[10] The one exception is George Shiras, Jr., a Pittsburgh corporate lawyer appointed to the Court in 1892 by Benjamin Harrison. All five academicians to reach the Court (four of them appointed by FDR) had considerable experience in public life in addition to their academic backgrounds. Fourteen Attorneys General have been nominated to the Court. Nine were successfully appointed—Taney, Clifford, Moody, McKenna, McReynolds, Stone, Jackson, Murphy and Clark. Two were rejected by the Senate and two withdrew before confirmation. One, Edwin M. Stanton, was confirmed, but died before taking his seat. Abraham at 52; Schmidhauser at 82–83.

B. Political and Legal Philosophy

Because intellect is rarely the sole determinant of a Supreme Court nomination, and because most Presidents have attached great importance to the Supreme Court's role in legitimating particular policies or national goals, the acceptability of a candidate's personal philosophy is often another *sine qua non* for nomination. As with "merit," however, what constitutes an acceptable philosophy may depend on the times, on the President's attitude towards the Court, and on a candidate's fitness in other respects. For example, political considerations, such as rewarding partisan activity or defusing potential political opposition, may argue in favor of a particular nomination, although the appointing President could have identified a more personally compatible choice. In the case of Earl Warren, nominated by President Eisenhower for the Chief Justiceship in 1953, the President was likely impressed by Warren's political and administrative experience and skill, his positions on particular issues (such as the 1937 Court-packing bill and the 1952 steel seizure case), and his campaign service both to Eisenhower and to Thomas E. Dewey before him. However, Warren was also obstructing the takeover of California Republican politics by more partisan leadership, including Vice-President Nixon. Perhaps, had it not been for this last factor, Eisenhower would have turned to Governor Dewey or to Chief Justice Vanderbilt of the New Jersey Supreme Court for the vacant post.[11] In any event, Eisenhower did not know Warren's philosophy well (he sent Attorney General Brownell to interview him before the nomination), and disagreed with the philosophy eventually manifested in Warren's decisions.

At particular times in history, the importance of a single issue to the nation's welfare or to a President's program has seemed so great that a candidate's position on that issue, rather than his philosophy as a whole, became the litmus test of his acceptability. Obvious examples include the cause of Unionism under Lincoln, the constitutionality of greenbacks as legal tender under Grant, and the legitimacy of extensive government regulation under Franklin Roosevelt. The single-issue test, however, hardly guarantees a particular justice's pattern of thought. For example, the fervent antitrust position of Attorney General James Clark McReynolds undoubtedly recommended the idea of his nomination highly to President Wilson. However, once on the Court, McReynolds proved to be an unabashed conservative, and virtually all of his other positions were opposed to Wilsonian progressivism.

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[11] Abraham at 235–37.

Consequently, those Presidents most deeply interested in appointing politically compatible Justices have focused neither on single-issue positions, nor on partisan identification, but on the overall pattern of a candidate's values and opinions. As explained by Theodore Roosevelt to Senator Lodge, in a much-quoted 1906 letter discussing the potential appointment of Justice Lurton: "[T]he nominal politics of the man has nothing to do with his actions on the bench. His *real* politics are all important." [12]

The clearest recent expression of this approach to the selection of Supreme Court justices was offered by Presidential candidate Nixon, in discussing what he would do to replace Chief Justice Warren:

> The President cannot and should not control the decisions of the Supreme Court. . . . There are two important things I would consider in selecting a replacement to the Court. First, since I believe in a strict interpretation of the Supreme Court's role, I would appoint a man of similar philosophical persuasion. Second, recent Court decisions have tended to weaken the peace forces as against the criminal forces in this country. I would, therefore, want to select a man who was thoroughly experienced . . . in the criminal laws and its [sic] problems.[13]

Nixon said he wanted:

> strict constructionists who saw their duty as interpreting and not making law. They would see themselves as caretakers of the Constitution and . . . not super-legislators with a free hand to impose their social and political viewpoints on the American people.[14]

When they are measured against these standards, there is no reason to think that, on balance, Nixon would be disappointed with his appointees' performances on the Court. The most obvious exception may be Justice Blackmun's decision in the abortion cases, a decision no one could likely have anticipated.[15] Chief Justice Burger also has written or joined in strong pro-integration decisions.

One reason why a nominee's performance may eventually surprise the President who appointed him is the potential confusion, in the recruitment process, between a candidate's political and judicial philosophies. Franklin Roosevelt, for example, wanted ardent New Deal supporters on the Court. One such clear supporter was Felix Frankfurter. The central theme, however, of Justice Frankfurter's judicial philosophy proved to be judicial restraint. He believed that the constitutional distribution of powers among the branches of the federal govenment and between the federal and state governments required the Court to avoid decisions that he deemed merely the imposition of its own value choices on political authorities who were constitutionally empowered to decide the same value questions differently. This deference to the elected branches enabled Frankfurter, as a Justice, fully to support the New Deal legislative program. However, Frankfurter's record in interpreting the Bill of Rights would appear far less libertarian than that of other FDR appointees, especially Douglas, Black, and Murphy, despite similar *personal* philosophies, because his judicial philosophy was so much less expansive.

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[12] Schubert at 40.

[13] Ashby at 366, (quoting *Congressional Quarterly Almanac*, 91st Cong., 1st Sess. (1969) at 130).

[14] *Id.*

[15] It should also be noted that Nixon's ability to appoint a personally compatible Justice was most sharply curtailed by the time he nominated Justice Blackmun, because the failure of the Haynsworth and Carswell nominations made it politically necessary to locate a noncontroversial moderate. Abraham at 9.

In this vein, it should especially be noted that shorthand labels for candidates' philosophies can be misleading. President Nixon advocated "strict constructionism," but appointed at least one Justice, William Rehnquist, whose clear views of the constitutionally mandated distribution of powers, like most theories on the subject, is not compelled either by the language of the Constitution or by judicial precedent. For this reason, Rehnquist, though politically conservative, has been viewed by some as a judicial activist.[16] Conversely, Hugo Black, generally considered one of the nation's greatest liberal jurists, reached strongly libertarian results through "strict construction" of the First Amendment.[17]

A President should also recognize, if his aim is to affect the general direction of Court decisions, that his purpose can not always be best accomplished by an intellectually gifted person adhering unwaveringly to the President's or to any other doctrinaire point of view.[18] Critical to any Justice's potential influence is his ability to function effectively in a collegial decisionmaking context. Because a Supreme Court Justice is wedded to his colleagues for life, a gift for diplomacy, including a willingness to compromise when necessary, will make his presence more tolerable and his eventual contributions more persuasive. The indicia of political acceptability cannot be viewed wholly apart from the criteria of ability. A record of public or civic service; a strong, confident, and tolerant personality; and a mature temperament joined with legal ability and intellect mark not only the gifted potential judge, but also the effective institutional advocate.

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[16] *See generally* Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 Harv. L. Rev. 293 (1976).

[17] Rubin, *Judicial Review in the United States*, 40 La. L. Rev. 67, 77 (1979).

[18] For a highly elaborate, mathematically based theory for guiding Presidents in the selection of Justices who will influence Court dispositions, *see* S. Teger, *Presidential Strategy for the Appointment of Supreme Court Justices* (1976) (unpublished U. of Rochester Ph.D. thesis, Library of Congress).

C. Enhancing the Representativeness of the Court

In narrowing the pool of potential nominees, Presidents have frequently considered what category of individuals might enhance public perceptions of the "representativeness" of the Court. The primary measure of representativeness, as pursued by the Presidents, has been geographical. Although the Constitution does not require regional balance, a desire for it underlies, in part, the constitutional designation of the President to nominate Supreme Court Justices. It is recorded that, during the debate on this provision, James Madison urged the Constitutional Convention, "The Executive magistrate would be considered as a national officer, acting for and equally sympathizing with every part of the United States."[19] In a variety of constitutional provisions, the Framers clearly sought to avoid sectional domination of the Government, and it might be argued that, in seeking geographical balance on the Court, a President is respecting a value implicit in our constitutional system.

Geographic balance was most clearly a presidential consideration with respect to Supreme Court appointments through the late 19th century. In selecting the original members of the Court, George Washington chose representatives of New York, Pennsylvania, Massachusetts, Virginia, and South Carolina. As the country moved westward, each President, starting with Jefferson, began to seek seats first for Justices from states west of the Alleghenies, then from west of the Mississippi, and finally, with Lincoln's appointment of Stephen J. Field of California, from the Far West. Andrew Jackson, who made seven nominations, tried scrupulously to have represented each circuit in the nation's growing judicial system. The balance of Northerners and Southerners was also of obvious political significance, both before and after the Civil War. Part of President Hayes' program of postreconstruction reconciliation was the appointment of a Southerner (although Northern-born), William Woods, to the Court in 1880. The symbolism was consummated in 1887 by President Cleveland's appointment of Lucius Q. C. Lamar, the first "real" Southerner to reach the Court since 1853, and a former member of both the Confederate Army and the government of the Confederacy.[20]

In this century, although remaining of some concern, the emphasis on regionalism has been less obvious. Some Presidents have more or less disavowed its importance. Theodore Roosevelt wrote, "I have grown to feel, most emphatically, that the Supreme Court is a matter of too great importance to me to pay heed to where a man comes from."[21]

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[19] Padover at 405.

[20] Abraham at 131.

[21] Abraham at 146.

Roosevelt appointed, within a 4-year period, two Justices from Massachusetts, Oliver Wendell Holmes and William H. Moody. A similar "imbalance" occurred under Presidents Coolidge and Hoover, who appointed three New York Justices—Chief Justice Hughes and Associate Justices Stone and Cardozo. This imbalance, lasting 8 years, occurred notwithstanding Hoover's reluctance, before picking Cardozo, to choose another New Yorker for the Court.

The Supreme Court currently includes two Minnesotans (both appointed by Nixon), and one Justice each from New Jersey, Ohio, Colorado, Maryland,[22] Virginia, Arizona, and Illinois. The most recent New Englander to serve on the Court was Chief Justice Stone, who died in 1946. The most recent representative of the Deep South was Hugo Black, who died in 1971, although in selecting Justice Powell to succeed Black, President Nixon emphasized Powell's southern origins.

Although not explicitly contemplated during the constitutional debates, Presidents, for political reasons or otherwise, have also sought "balance" with respect to other criteria as well: partisan affiliation, religion, and, most recently, race. There continue to be strong pressures to appoint a woman Justice.

It is arguable that such considerations as race, religion, ethnicity, or sex are offensive criteria in the choice of Justices, because they distract from the idea of simply choosing the "best" persons for the Court or from the constitutional grant of total discretion to the nominating President. It is also arguable, however, that diversity on the Court boosts public confidence in the legitimacy of the Court's decisions. In addition, presidential concerns for diversity may properly affirm egalitarian ideals in the society at large and the value of diversity itself.

As the record now stands, of the 101 people to serve on the Court, all have been men, 100 have been white, 95 have been of Anglo-Saxon descent, 95 have been native-born, and almost all have been Protestant.[23] Roger Taney, a Catholic and the first non-Protestant appointed, served from 1836 to 1864. Thereafter, one seat on the Court was held by a Catholic from 1894 to the present, except for a 7-year period between 1949 and 1956.[24] Louis Brandeis, the first Jewish Justice, was appointed in 1916. At least one seat on the Court between 1916 and 1969 was held by a Justice who was Jewish.[25] Thus, except for a pattern of regional diversity, the history of the Court reveals a largely homogeneous membership when measured according to the most obvious criteria of social background.

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[22] Though appointed from New York, Justice Marshall was born and started his legal career in Baltimore. Ashby at 320–26.

[23] Abraham at 53.

[24] This group includes Justices E. D. White, McKenna, Butler, Murphy, and Brennan. Abraham at 56–57.

[25] This group includes Justices Cardozo, Frankfurter, and Goldberg. Abraham at 58.

D. Other Criteria

Ability, character, and philosophical or representative suitability hardly exhaust the list of criteria evident in the nominations made to the Court thus far. Age and health, of course, have played major parts. The appointment of a younger person to the Court may help assure a new Justice's continued influence over a long period, or at least help assure the Court of the continued aid of a physically vigorous individual. In one case, perhaps, a President used old age as a criterion. William Howard Taft's appointment in 1910 of the 66-year-old Edward D. White to be Chief Justice may have been motivated, in part, by Taft's desire to assure the subsequent occurrence of a vacancy that he himself could assume after his Presidency.[26]

Other considerations in the choice of nominees may include friendship, the rewarding of political partisanship or of particular public service, the effective elimination of a political opponent, placating political opposition or securing political support. None of these alone has likely secured the position of a Supreme Court Justice; however, each has been among the motivations underlying the selection of particular nominees from pools of otherwise qualified persons.

The presence of ulterior motives in the nominating process or a close association between a nominee and the appointing President of course need not correlate with the candidate's unsuitability on other grounds. Among the justices appointed by the Presidents of whom they were close personal or political allies are Roger Taney (Jackson), Stephen Field (Lincoln), Harlan Fiske Stone (Coolidge), and Felix Frankfurter (FDR), all of whom would have qualified under any set of criteria.

However, although no clear formula exists for the selection of a great future Justice or one set formula to identify a fit nominee, the President's thinking perhaps may usefully be guided by a set of general principles. With respect to criteria closely related to a person's likely performance on the Court, some high degree of ability, character, health, and philosophical compatibility ought to be viewed as a set of threshold requirements. Having identified a pool of qualified finalists, the President could then—without undermining public confidence in his choice—consider other criteria, *e.g.*, geographic suitability, background (sex, race), or rewarding public service, that might legitimately play a part in his ultimate selection. To the extent his criteria might be considered personal or political favoritism, he should be all the more careful that his choice be defensible when measured against other candidates and against criteria related to likely performance. Though no President can guarantee greatness in his appointees, he can likely avoid serious disappointment by soliciting a variety of suggestions for any vacancy, evaluating candidates across a wide range of criteria, and, in analyzing his personal preferences, bearing in mind the Court's needs and public perceptions of the Court.[27]

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[26] Abraham at 159.

III. Identification and Evaluation of Nominees

Because presidential acquaintance and selection criteria rarely limit the pool of eligible candidates for the Supreme Court to one, Presidents ordinarily rely to some degree on the assistance and advice of others in choosing their nominees. Analytically, such assistance may be viewed as coming in two stages: first, the identification of suitable candidates for the Court; second, the more exacting evaluation of the serious contenders.

A. Identification of Potential Nominees

Potential sources of information concerning suitable candidates are almost endless. Solicited or unsolicited suggestions may come from the President's advisers, both official and unofficial, as well as from Members of Congress, sitting members of the judiciary, legal scholars, state bar representatives, concerned private citizens and candidates themselves.

Some instances are known in which Congress played a strong role, invited or otherwise, in the candidate identification process. In perhaps the most dramatic instance, Thomas Jefferson, in his search for a Supreme Court Justice to come from west of the Appalachians, asked each Member of Congress to suggest two names. He selected Thomas Todd of Kentucky, the one person named as first or second choice by every Member of Congress from the new Seventh Circuit, which comprised Kentucky, Ohio, and Tennessee. Later in the 19th century, Congress mounted notable, though uninvited campaigns for President Lincoln's 1862 nomination of Samuel Miller[28] and for President Grant's 1869 nomination of Edwin M. Stanton.[29] Although these are exceptional examples of congressional activism, suggestions by individual Members of Congress, particularly from the leadership, are undoubtedly common.

Suggestions from sitting judges or Justices may also be expected. Indeed, in one case, the entire incumbent Supreme Court wrote to the President to urge the nomination of a particular candidate: John Campbell of Alabama, who was nominated for the Court in 1853 by President Pierce.[30] Chief Justices may more routinely offer their views on nominations. The most active campaigner among Chief Justices was likely William Howard Taft. Taft had appointed six men to the Court during his tenure as President, and appears to have been principally responsible for selecting three nominees, including himself as Chief Justice, for President Harding.[31] More recently, Chief Justice Burger is known at least to have supported the nominations of Associate Justices Blackmun and Powell.[32]

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[27] A President should also be aware of the extent to which an appointment may, as a matter of political fact, "change the law." There are issues, such as federalism, affirmative action, the death penalty, abortion rights, and school desegregation, on which lawyers and political scientists perceive the current Court in flux. The balance of Court opinion on issues in these areas may be affected by a new Justice, although Presidents typically have not been successful in making new law through individual appointments. This is attributable not only to the unpredictability of an individual's views and behavior, discussed above, but also to the Justices' ordinary adherence to precedent, by which most Justices consider themselves guided, if not bound.

[28] Schubert at 41–44.

[29] Abraham at 118.

Where Presidents have turned to Cabinet officers for advice, it is common for the Attorney General to play a major role both in suggesting and in evaluating nominees. George Washington initiated the practice by asking Edmond Randolph to prepare a list of candidates for the bench.[33] In recent decades, Attorneys General Cummings and Biddle (for FDR), Brownell (for Eisenhower), Robert Kennedy (for John Kennedy), Mitchell (for Nixon), and Levi (for Ford) all performed significant "screening" functions during the nominations process. However, just as no legal provision limits presidential criteria for candidate selection, there are no formal limitations or requirements binding the President to any particular system of identifying Supreme Court candidates.[34]

B. Evaluation of Nominees (Herein, the Roles of the Department of Justice and of the American Bar Association)

Whoever is responsible for identifying plausible candidates, the function remains of evaluating the serious contenders according to the President's criteria. In 1789, when the Judiciary Act established a federal bench comprising 19 judges, the evaluation process could rely with some success on the personal knowledge of the President and of his close advisers. Even for a nine-member Supreme Court, however, this is no longer a wholly satisfactory option. The far greater pool of available talent today and the intensity of public scrutiny to which nominees are currently subjected make it desirable to follow a more rigorous and dependable information-gathering process.

A tradition is now well established of active Attorney General and Department of Justice participation in the process of evaluating Supreme Court nominees. The exact pattern of participation has varied with different Presidents. The Attorney General, with whatever Department assistance he seeks, may initiate a study of potential nominees. The Department also plays a special role in marshalling the recommendations of private groups and individuals, most notably—since the Eisenhower Administration—of the American Bar Association (ABA) Standing Committee on Federal Judiciary (the ABA Committee).

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[30] Abraham at 104.

[31] Abraham at 21, 155.

[32] Woodward and Armstrong at 87, 160.

[33] Rogers at 38.

[34] For a time, in the early 19th century, the Department of State was assigned the function of offering the President recommendations concerning all appointments. Even after Attorney General Cushing in 1853 reassumed the assignment for his office with respect to judicial appointments, Attorney General Bates, under Lincoln, was still able to complain that the Secretary of the Treasury had been instrumental in making many appointments "without any reference to legal and judicial qualifications." Rogers at 39.

The practice of soliciting formal ABA views on Supreme Court nominations began with President Eisenhower's 1956 nomination of Judge William J. Brennan, Jr. to replace Justice Minton. The President had assigned to Attorney General Brownell and the Department of Justice the task of recommending a nominee to meet four specific criteria: an exemplary personal and professional reputation for legal and community leadership; good health; relative youth; and ABA "recognition." He also expressed a preference for giving most serious consideration to the promotion of an outstanding lower court judge.[35] Brownell, to whom Judge Brennan was strongly recommended by New Jersey's Chief Justice Vanderbilt, the New Jersey Bar Association, the American Judicature Society, and a host of other organizations,[36] submitted Brennan's name to the Federal Bureau of Investigation for a full-field investigation and to the ABA Committee for its assessment of professional qualifications. The results of the ABA and FBI investigations were presented to the Attorney General for his consideration and eventual review with the President.[37]

FBI full-field checks on proposed nominees are routine. Since the Brennan appointment, however, the mode of ABA input has varied from nomination to nomination. Through the Johnson Administration, it was typical practice to afford the ABA a very brief investigation period prior to the announcement of a nomination. The resulting time pressure apparently made it difficult for the ABA to rely successfully, in its view, on any precise system of ranking nominees. For example, with Justice Goldberg's nomination in 1962, the Committee decided to abandon any statement seeming to rank or quantify the nominee's suitability, and instead offered the statement that the nominee was "highly acceptable from the point of view of professional qualifications." [38]

For undisclosed reasons, President Nixon abandoned the practice of consulting the ABA prior to announcing his nominees, a decision that, with respect to the President's attempts to find a successor to Justice Fortas, seemingly contributed to controversial results both for the President and for the ABA. The ABA Committee, like the general public, learned of the Nixon nominations only from the President's announcements. With the invitation of the Senate Judiciary Committee, the ABA Committee first reviewed the qualifications of Judge Clement F. Haynsworth, Jr., the first Nixon nominee to the Fortas seat. The Committee unanimously found Haynsworth "highly qualified" for the post, a conclusion that it later ratified only 8-4 after public disclosures during the confirmation process indicated possible insensitivity on Judge Haynsworth's part to financial conflicts of interest.

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[35] Rogers at 39–40; Abraham at 235.
[36] Abraham at 245.
[37] Rogers at 40.
[38] Walsh at 556.

When the Senate defeated the Haynsworth nomination, President Nixon, acting again on the recommendation of Attorney General Mitchell, nominated Judge G. Harrold Carswell, a former U.S. district judge in the Northern District of Florida who had recently been appointed to the U.S. Court of Appeals for the Fifth Circuit. Mitchell was reported to have said of Carswell, "He is almost too good to be true."[39] Sensitized by the Haynsworth debate and apparently hoping to avoid dissent on the degree of a nominee's suitability, the ABA Committee, in assessing Carswell's background, reverted to a "qualified"/"not qualified" system of evaluation, and reported Carswell "qualified." When Carswell, during the confirmation process, was attacked for mediocre judicial talent and hostility to civil rights, and ultimately defeated, the prestige of the ABA also suffered, although ABA Committee Chairman Lawrence E. Walsh defended the Committee's assessment in light of its investigation into Carswell's performance on the Fifth Circuit.[40]

President Nixon again did not consult the ABA Committee before announcing his third nominee to the Fortas seat, Judge Harry A. Blackmun of the U.S. Court of Appeals for the Eighth Circuit. Chief Justice Burger supported Blackmun's nomination, and the candidate was interviewed by Attorney General Mitchell and the Assistant Attorneys General in charge of the Office of Legal Counsel and the Tax Division.[41] The ABA Committee again conducted a post-announcement evaluation. It adopted a "not qualified"/"not opposed"/"meets high standards of integrity, judicial temperament, and professional competence" system of ranking, seeking to avoid the appearance of a plenary endorsement for a merely acceptable candidate and emphasizing the assertedly nonideological character of its endorsement for a highly qualified candidate.[42] The ABA Committee turned in its most extensive report ever on a Supreme Court nominee for Judge Blackmun, finding that he met "high standards of integrity, judicial temperament, and professional competence."[43] The Senate unanimously confirmed the Blackmun nomination on May 12, 1970.

These events, however, did not conclude the Nixon Administration's history of difficulties with the ABA. In September, 1971, Justices Black and Harlan resigned, leaving the President the task of replacing two of the Court's most highly esteemed members. Attorney General Mitchell had written in July, 1970, to ABA Committee Chairman Walsh that the Administration would henceforth submit lists of Supreme Court candidates to the Committee for its evaluation prior to nomination, an announcement that won high acclaim in light of the ABA's rigorous work on the Blackmun nomination.[44] The President's first suggested candidate was Rep. Richard H. Poff of Virginia, who received the Committee's highest recommendation, but the President withdrew his name from consideration when the press reported his past anti-civil rights statements.

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[39] Abraham at 6.

[40] Walsh at 556-57.

[41] Woodward and Armstrong at 86.

[42] Walsh at 560.

[43] Walsh at 560.

The Administration's next submission was a list of six names, including California Court of Appeals Judge Mildred Lillie, Arkansas municipal bond lawyer Herschel H. Friday, D.C. Superior Court Judge Sylvia Bacon, Sen. Robert C. Byrd of West Virginia, and Judges Charles Clark and Paul H. Roney of the U.S. Court of Appeals for the Fifth Circuit. The first two were the President's top choices—Mr. Friday was a close friend of Attorney General Mitchell and had been recommended by Chief Justice Burger and Justice Blackmun—and the Committee devoted almost all its investigative work to them.[45] The Attorney General had recommended the submission of their names notwithstanding reservations expressed by White House Counsel John Dean and Assistant Attorney General Rehnquist concerning their judicial experience and lack of constitutional law background.[46] The results were a unanimous vote of "not qualified" for Judge Lillie and a 6–6 tie between "not qualified" and "not opposed" for Mr. Friday. News of the ABA actions reached the press within hours of its report to the Attorney General; the ABA urged the President to "add some people with stature" to his list.[47] The Administration informed the ABA in a letter from the Attorney General to Chairman Walsh that it could no longer rely on the confidentiality of the Committee, and would return to its practice of submitting nominations directly to the Senate.[48]

According to two commentators, Attorney General Mitchell acted prior to the ABA Committee's formal vote to solicit the acceptance by another candidate, former ABA president Lewis F. Powell, Jr., of his nomination to the Black seat.[49] Mitchell and Deputy Attorney General Kleindienst recommended to the President his eventual nominee for the Harlan seat, Assistant Attorney General Rehnquist.[50] Subsequent to the

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[44] Abraham at 28.

[45] Abraham at 10, 29.

[46] Woodward and Armstrong at 159.

[47] Abraham at 10.

[48] Abraham at 30.

[49] Woodward and Armstrong at 160.

[50] Woodward and Armstrong at 161.

President's announcement of his choices, the ABA Committee voted unanimously that Powell met "high standards of integrity, judicial temperament, and professional competence." Eight members of the Committee voted the same endorsement of Rehnquist, with four voting "not opposed." Powell was confirmed by the Senate almost immediately, and Rehnquist, within several weeks.

In contrast to this stormy history, the Department of Justice and the ABA enjoyed a smooth relationship during the process of evaluating candidates in 1975 to succeed Justice William O. Douglas. President Ford and Attorney General Levi returned to the practice of submitting names to the Committee for its evaluation prior to nomination. On the day of Douglas' retirement, Levi submitted a list of candidates to the ABA Committee.[51] The Committee unanimously gave Levi's first choice, Judge John Paul Stevens of Chicago, its highest rating. Judge Stevens was subsequently nominated and confirmed without difficulty.

These events underscore significant questions of how best to make use of the assistance and resources of private parties in the evaluation of Supreme Court candidates and, at the same time, maintain the full scope of presidential discretion that the Constitution provides for the nomination of Supreme Court Justices. ABA assistance can undoubtedly be helpful in the evaluation of Supreme Court candidates, although how best to accomplish its role has itself been a subject of long debate by the ABA Committee. The Committee describes its function as limited to an examination of "professional competence, judicial temperament, and integrity,"[52] about which it is undoubtedly able to express an educated point of view. As time permits, the Committee's investigation includes interviews with judges, scholars, lawyers, public officials, and other parties likely to have information regarding a nominee's qualifications, plus a review of the nominee's writings by teams of law school professors and practicing lawyers. The ABA Committee's conclusions based on this kind of thorough study may be a useful guide to the President or his advisers in applying the President's criteria during the nomination process.

However, extensive ABA input, especially before nomination, may lead to criticism that an organization that is not responsible to any public political process is exercising undue influence in the presidential selection of nominees.[53] The ABA Committee currently comprises 14 members—one member at-large and one practicing lawyer from each of the geographic areas covered by the 11 judicial circuits, except for the Fifth and Ninth, which areas—because of their size—have two members each. There can be no assurance, however, that it fully represents the American public, or even the American bar, given that nearly half the lawyers in the United States do not belong to the ABA. Neither is there any government control over the exhaustiveness of its survey or the objectivity of its evaluation. Though consultation with the ABA prior to nomination may confer advantages in the evaluation process, it may risk the public's perception that the selection process for the least politically accountable branch of government is itself being removed a step from public accountability.[54]

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[51] American Bar Association at 2.

[52] American Bar Association at 2.

[53] Abraham at 23; Grossman at 212-15; Murphy and Pritchett at 76-77; Schmidhauser at 28-33.

What is not open to question is that, whatever sources are consulted prior to nomination, the pre-nomination investigation of any nominee should be deep, broad, and disinterested enough to assure an informed evaluation of the nominee's professional qualifications, temperament, health, and integrity. So long as the goals of the investigative process and the advisory roles of the participants are clearly defined, it should be possible to avoid the difficulties encountered during the Nixon nominations and make the best possible use of information from all sources.

IV. The Confirmation Process

Once the processes of candidate evaluation produce a nominee, the President submits his choice for the "advice and consent" of the Senate. For the first half of this century, it appeared that the Senate's role in materially influencing the selection of a Justice had ended; its confirmation of presidential nominees was virtually automatic.[55] Though equal participation by the Senate and the President in choosing Justices may be gone, however, the Senate has significantly reasserted its hand in the selection of Justices since 1968. Since the conditional resignation of Earl Warren from the Chief Justiceship, four presidential nominations for the Chief or an Associate Justiceship have been withdrawn or were defeated at least in part because of Senate action.[56]

The Senate's procedure following nomination is straightforward. Except in the cases of two ex-Senators, the Senate has always referred Supreme Court nominations to the Senate Judiciary Committee. Since

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[54] It has been debated since 1973 whether the reporting and other "sunshine" provisions of the Federal Advisory Committee Act, 5 U.S.C. App. § 10, apply to the ABA Committee in its role of advising this Department. The Office of Legal Counsel concluded in 1973 that the Act does cover the ABA Committee, although the practical effects of such coverage on the operation of the Committee would be limited. This position was affirmed in a February, 1974, letter from Attorney General Saxbe to the ABA Committee. After further correspondence, Attorney General Saxbe informed the Committee in October, 1974, that OLC, under then Assistant Attorney General Scalia, had reexamined the issue and found that the Act did not cover the ABA Committee.

[55] Prior to 1968, the Senate failed only once in this century to confirm a presidential nomination to the Supreme Court: President Hoover's 1930 nomination of Judge John J. Parker to be an Associate Justice. Swindler at 536.

[56] Justice Fortas withdrew his nomination for the Chief Justiceship in October, 1968, after the Senate failed to end a filibuster preventing a vote on his elevation. His action eliminated the prospective vacancy to which President Johnson had nominated Judge Homer Thornberry of the Fifth Circuit. In 1969, the Senate defeated President Nixon's first nominee to succeed Justice Fortas, Judge Clement F. Haynsworth, Jr. In 1970, it defeated his second nominee, Judge G. Harrold Carswell. Abraham at 266; Swindler at 536.

President Coolidge's nomination in 1925 of Harlan Fiske Stone to an Associate Justiceship, the committee has usually interviewed the nominee in person.[57] It is modern practice, since President Roosevelt's 1938 nomination of Stanley Reed, for the committee to hold public hearings on the nomination.[58] If the committee recommends approval, as it invariably has in recent decades, the nomination is sent to the floor for debate and an eventual vote by the entire Senate. Confirmation requires a majority vote.

The factors that may affect the results of a Senate confirmation vote are innumerable; long and complex explanations have been written concerning the politics of the confirmation process. Although the history is fascinating, this memo will only briefly consider the politics of confirmation to underline the one relevant and perhaps obvious point that Senators' opposition to a candidate may not relate in any way to the President's criteria for choosing a suitable candidate for the Court. This is understandable because Senators may well decide their votes based on partisanship, individual animosity, opposition to a nomination by constituent or special interest groups, ideological differences, or intraparty politics.[59]

One commentator has usefully divided the reasons for Senate opposition to a candidate into three categories: reasons related to the character, ability, or integrity of the candidate; reasons related to partisanship or the candidate's ideology; and reasons related to a candidate's prior identification with the unpopular side of a significant political controversy.[60] The stronger the opposition to a candidate, the more likely the nominee is to face detractors on all of these grounds.

Relatively few nominees have been credibly opposed on grounds of outright inability. Perhaps the nominee to fare worst in this respect was George H. Williams, an undistinguished lawyer nominated unsuccessfully by President Grant in 1873. Most recently, Judge Carswell was opposed in part because of alleged lack of ability, although it would be difficult to determine the relative importance to his defeat of the Senate's evaluation of his judicial performance and its reaction to his record of apparent insensitivity to civil rights.

Opposition on ethical grounds was a factor in the defeat of both the nomination of Justice Fortas to be Chief Justice and the nomination of Judge Haynsworth to succeed Justice Fortas. The filibuster against

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[57] Stone's nomination was controversial chiefly because, having succeeded a Harding appointee, Harry M. Daugherty, as Attorney General, he refused to drop a Department of Justice case brought by Daugherty, a figure in the Teapot Dome scandal, against Senator Wheeler of Montana. Frank at 491.

[58] The Judiciary Committee decided to end its practice of conducting its nomination debates entirely in executive session after the controversy engendered by public revelation of the past Ku Klux Klan membership of Justice Hugo Black, whose nomination it had approved by a vote of 13–4 in 1937. Abraham at 201; Ashby at 53.

[59] *See generally* Goff; Swindler.

[60] Ashby at 29–31.

Fortas may have succeeded chiefly because of opposition to his judicial philosophy and opposition to President Johnson as a lameduck President in 1968. However, Fortas was also opposed for accepting paid employment by American University while on the Court and for maintaining a close advisory relationship with President Johnson, which seemed to some an inappropriate breach of separation of powers.[61] When Fortas later resigned under charges of ethical insensitivity (he had received and returned, while on the Court, fees from investor Louis Wolfson and the Wolfson family's foundation), President Nixon's first designated successor, Judge Haynsworth, faced opposition based on his participation in lower court cases in which he arguably had or created a financial conflict of interest.[62]

Considerations of personal or judicial ideology were clearly grounds for Senate opposition to the nominations of Justice Fortas and Judges Haynsworth and Carswell. Senators opposed Fortas' liberal stands on desegregation, criminal procedure, and free speech. Civil rights and labor groups attacked the allegedly hostile positions of Judge Haynsworth. Judge Carswell's opponents emphasized his statement in support of "the principles of White Supremacy" during his 1948 campaign for the Georgia legislature.[63]

Partisan opposition, whether or not "ideological," may also defeat a candidate. Of the 14 presidents whose nominees were rejected or otherwise "killed" by the Senate, six—John Quincy Adams, Tyler, Polk, Fillmore, Buchanan, and Andrew Johnson—held office in the face of overwhelming congressional opposition. At the times they lost their respective nomination fights, it is doubtful that they could have secured the nomination of almost any individual to the Court.

Interestingly, the most "venerable" ground historically for Senate opposition to a nominee is the nominee's prior identification with the losing side in a national controversy. The first rejected nomination was that of John Rutledge for Chief Justice in 1795, based largely on his attack on the Jay Treaty, which the Federalists vigorously supported. No one-issue debate has loomed as large in the defeat of any Supreme Court nominee in this century.

The role of the Attorney General and the Department of Justice in the appointment process has generally been to identify and evaluate candidates according to the President's criteria. Department of Justice witnesses, however, have occasionally played a role in confirmation hearings either to elaborate on the Administration's evaluation of a nominee's record or to comment on legal issues raised by a particular appointment. Not including former Assistant Attorney General Rehnquist's testimony at his own confirmation hearing, Department of Justice Representatives have testified with respect to only two of the nine persons nominated to the Supreme Court since 1968. Attorney General Levi testified in support of the 1975 nomination of Judge John Paul Stevens. *Nomination of John Paul Stevens to be a Justice of the Supreme Court: Hearings Before the Senate Comm. on the Judiciary,* 94th Cong., 1st Sess. 3 (1975). During the hearings on Justice Fortas' nomination to the Chief Justiceship, Attorney General Clark testified regarding whether Chief Justice Warren's conditional resignation legally created a vacancy on the Court, *Nominations of Abe Fortas and Homer Thornberry: Hearings Before the Senate Comm. on the Judiciary,* 90th Cong., 2d Sess. 8 (1968), and Deputy Attorney General Warren Christopher testified regarding a memorandum he had prepared at the request of committee member Senator Hart concerning the meaning and impact of the Supreme Court opinions of Justice Fortas. *Id.,* at 315.[64]

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[61] Ashby at 338–41.

[62] Abraham at 4–5; Ashby, at 387–88.

[63] Ideological opposition to a candidate may, of course, backfire. The overall career record on civil rights and labor issues of Fourth Circuit Judge John J. Parker, whose Supreme Court nomination was defeated in 1930, was undoubtedly more progressive or liberal then the Supreme Court voting record of President Hoover's subsequent successful nominee, Owen J. Roberts, although Parker's nomination was defeated primarily through the pressure of labor and civil rights groups. Schubert at 49–50.

V. Conclusion: The Appointment Process and Post-Appointment Performance

Unsurprisingly, the measures of success on the Court vary as widely as the criteria for selection.[65] In considering what process of candidate selection is most likely to yield a successful Justice, it must first be borne in mind that, like other virtues, judicial excellence is significantly in the eye of the beholder, varying with time and place.

If a President's measure of success is the predictability of his appointee's decisions, no selection process can guarantee a happy result. Even a President's intimate familiarity with the opinions of a nominee cannot assure that their views will coincide as the appointed Justice grows in his position and faces novel questions unforeseen at the time of his appointment. There are notable examples of presidential dissatisfaction with the performance of an appointee, *e.g.,* Madison, with the Federalist Story; Teddy Roosevelt, with Holmes' vote in the Northern

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[64] A Department of Justice Attorney, Norman Knopf, testified under subpoena in a private capacity during the hearings on Judge Carswell concerning his experiences with Judge Carswell while a member of the Law Students Civil Rights Research Council, prior to his employment with the Department of Justice. *George Harrold Carswell: Hearings Before the Senate Comm. on the Judiciary,* 91st Cong., 2d Sess. 174 (1970).

[65] Two commentators have written that success on the Court is:

> the result of several qualities in combination: scholarship; legal learning and analytical powers; craftsmanship and technique; wide general knowledge and learning; character, moral integrity and impartiality; diligence and industry; the ability to express oneself with clarity, logic and compelling force; openness to change; courage to take unpopular positions; dedication to the Court as an institution and to the office of Supreme Court Justice; ability to carry a proportionate share of the Court's responsibility in opinion writing; and finally, the quality of statesmanship.

Dennis, *Overcoming Occupational Heredity at the Supreme Court,* 66 A.B.A. J. 41, 43 (1980) (quoting A. Blaustein and R. Mersky, *The First One Hundred Justices: Statistical Studies of the Supreme Court of the United States* (1978)).

Securities case; Wilson, with the conservative McReynolds; and Eisenhower, with Warren.[66]

It is likely that those Presidents who measured success more by the craftsmanship of their appointees were better pleased than those counting on predictable votes. The average Justice has been one who has reliably made substantial contributions to acceptable adjudications of difficult issues over a significant period of time. Not every Justice, of course, possesses the creativity, intellect, political acumen, and perhaps longevity, to achieve not only excellence, but "greatness." However, those candidates with the potential to be truly exceptional and extraordinary rarely stand out clearly from the pool of excellent candidates, and a process seeking to identify the "potentially great" might prove more whimsical than practical. While the eminence of John Marshall or Brandeis was perhaps predictable, no prognosticator could confidently have predicted the careers of Harlan Fiske Stone, Hugo Black, or Earl Warren. Whether a process aimed at finding "great" future jurists would have focused on them originally cannot be known.

History gives much reason for optimism that, whatever the President's criteria, a potentially successful member of the Court meeting those criteria can be found with proper care. A clear set of standards, input from numerous sources, a broad-based search for candidates, and time enough for a thorough evaluation are the elements necessary and sufficient to find the appropriate nominee.

APPENDIX

DATA ON SUPREME COURT APPOINTMENTS

1. Succession of the Justices of the Supreme Court of the United States
2. Supreme Court Nominations Rejected or Refused
3. Prior Judicial Experience of U.S. Supreme Court Justices and Their Subsequent Service
4. Occupations of Supreme Court Designees at Time of Appointment
5. Acknowledged Religion of the 100 Individual Justices of the Supreme Court (at time of appointment)
6. The 31 States From Which the 103 Supreme Court Appointments Were Made
7. Occupational Backgrounds of Supreme Court Nominees Since 1937

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[66] Abraham at 62–63.

Table 1

TABLE OF SUCCESSION OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

Showing Years of Active Service on the Court

February, 1972

TABLE OF SUCCESSION OF THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

	Judiciary Act of 1789 provided for a Chief Justice and 5 Associate Justices											
1789	John Jay 1789-1795	John Rutledge 1789-1791	William Cushing 1789-1810	James Iredell 1790-1799	James Wilson 1789-1798	John Blair 1789-1796						
1790	John Rutledge 1795 Oliver Ellsworth 1796-1799	Thomas Johnson 1791-1793 William Paterson 1793-1806		Alfred Moore 1799-1804	Bushrod Washington 1798-1829	Samuel Chase 1796-1811	Act of February 24, 1807, provided for increase of the Court to 7 members.					
1800	John Marshall 1801-1835	Henry B. Livingston 1806-1823		William Johnson 1804-1834			Thomas Todd 1807-1826	Act of March 3, 1837, provided for increase of the Court to 9 members.		Act of March 3, 1863, provided for increase of the Court to 10 members.		Act of April 10, 1869, provided for increase of the Court to 9 members.
1810			Joseph Story 1811-1845			Gabriel Duval 1811-1836					Act of July 23, 1866, provided for reduction of the Court to 7 members as vacancies should occur. (Actually the Court fell to 8.)	
1820		Smith Thompson 1823-1843					Robert Trimble 1826-1828 John McLean 1829-1861					
1830	Roger B. Taney 1836-1864			James M. Wayne 1835-1867	Henry Baldwin 1830-1844	Philip P. Barbour 1836-1841		John Catron 1837-1865	John McKinley 1837-1852			
1840		Samuel Nelson 1845-1872	Levi Woodbury 1846-1851		Robert C. Grier 1846-1870	Peter V. Daniel 1841-1860						
1850			Benjamin R. Curtis 1851-1857 Nathan Clifford 1858-1881	Act of July 23, 1866, provided for reduction of the Court to 7 members as vacancies should occur					John A. Campbell 1853-1861			
1860	Salmon P. Chase 1864-1873					Samuel F. Miller 1862-1890	Noah H. Swayne 1862-1881	Act of July 23, 1866, provided for reduction of the Court to 7 members as vacancies should occur	David Davis 1862-1877	Stephen J. Field 1863-1897		
1870	Morrison R. Waite 1874-1888	Ward Hunt 1872-1882			William Strong 1870-1880				John M. Harlan 1877-1911			Joseph P. Bradley 1870-1892
1880	Melville W. Fuller 1888-1910	Samuel Blatchford 1882-1893	Horace Gray 1881-1902		William B. Woods 1880-1887 Lucius Q. C. Lamar 1888-1893		Stanley Matthews 1881-1889 David J. Brewer 1889-1910					
1890		Edward D. White J 1894 CJ 1910-1921			Howell E. Jackson 1893-1895 Rufus W. Peckham 1895-1909	Henry B. Brown 1890-1906				Joseph McKenna 1898-1925		George Shiras, Jr 1892-1903
1900			Oliver Wendell Holmes 1902-1932		Horace H. Lurton 1909-1914	William H. Moody 1906-1910						William R. Day 1903-1922
1910	Edward D. White J 1894 CJ 1910-1921	Willis Van Devanter 1910-1937			James C. McReynolds 1914-1941	Joseph R. Lamar 1910-1916 Louis D. Brandeis 1916-1939	Charles E. Hughes 1910-1916 John H. Clarke 1916-1922		Mahlon Pitney 1912-1922			
1920	William H. Taft 1921-1930						George Sutherland 1922-1938		Edward T. Sanford 1923-1930	Harlan F. Stone J 1925 CJ 1941-1946		Pierce Butler 1922-1939
1930	Charles E. Hughes 1930-1941	Hugo L. Black 1937-1971	Benjamin N. Cardozo 1932-1938 Felix Frankfurter 1939-1962			William O. Douglas 1939	Stanley F. Reed 1938-1957		Owen J. Roberts 1930-1945			
1940	Harlan F. Stone J 1925 CJ 1941-1946 Fred M. Vinson 1946-1953				James F. Byrnes 1941-1942 Wiley Rutledge 1943-1949 Sherman Minton 1949-1956				Harold H. Burton 1945-1958	Robert H. Jackson 1941-1954		Frank Murphy 1940-1949 Tom C. Clark 1949-1967
1950	Earl Warren 1953-1969				William J. Brennan 1956		Charles E. Whittaker 1957-1962		Potter Stewart 1959	John M. Harlan 1955-1971		
1960	Warren E. Burger 1969		Arthur J. Goldberg 1962-1965 Abe Fortas 1965-1969				Byron R. White 1962					Thurgood Marshall 1967
1970		Lewis F. Powell, Jr 1972	Harry A. Blackmun 1970							Wm. H. Rehnquist 1972		
1980												

*Succeeded by Justice John Paul Stevens, December 19, 1975.

From Abraham at 292-93.

TABLE 2.—SUPREME COURT NOMINATIONS REJECTED OR REFUSED

[In the following tabulation, details on the nominations to the Supreme Court of the United States which were declined by the nominees or acted on adversely by the Senate have been summarized. The political composition of the Senate at the time of such action is shown by major parties only: F.—Federalist; A.-F.—Anti-Federalist; D.R.—Democratic Republican; N.R.—National Republican; W.—Whig; D.—Democratic; R.—Republican.]

President and Supreme Court nominee	Senate composition	Date of nomination	Action on nomination	Nature of action
George Washington				
Robert H. Harrison	F. 17; A.-F. 9	Sept. 24, 1789	Sept. 26, 1789	Confirmed; declined.
William Paterson[1]	F. 17; A.-F. 13	Feb. 27, 1793	Feb. 23, 1793	Withdrawn.
John Rutledge, C.J.[2]	F. 19; A.-F. 13	July 1, 1795 Nov. 5, 1795	Dec. 15, 1795	Rejected, 10–14.
William Cushing, C.J.	F. 19; A.-F. 13	Jan. 26, 1796	Jan. 27, 1796	Confirmed; declined.
John Adams				
John Jay, C.J.	F. 19; D.R. 13	Dec. 18, 1800	Dec. 19, 1800	Confirmed; declined.
James Madison				
Levi Lincoln	D.R. 28; F. 6	Jan. 2, 1811	Jan. 13, 1811	Confirmed; declined.
Alexander Wolcott	D.R. 28; F. 6	Feb. 4, 1811	Feb. 13, 1811	Rejected, 9–24.
John Q. Adams	D.R. 28; F. 6	Feb. 21, 1811	Feb. 22, 1811	Confirmed; declined.
John Q. Adams				
John J. Crittenden	D.R. 28; N.R. 20	Dec. 17, 1828	Feb. 12, 1829	"Postponed."
Andrew Jackson				
Roger B. Taney[3]	D. 20; W. 20	Jan. 15, 1835	Mar. 3, 1835	"Postponed," 24–21.
William Smith	D. 30; W. 18	Mar. 3, 1837	Mar. 8, 1837	Confirmed; declined.
John Tyler				
John C. Spencer	W. 28; D. 25	Jan. 9, 1844	Jan. 31, 1844	Rejected, 21–26.
Reuben H. Walworth	W. 28; D. 25	Mar. 13, 1844	Jan. 15, 1845 Jan. 27, 1845	"Postponed." Withdrawn.
Edward King	W. 28; D. 25	June 5, 1844 Dec. 4, 1844	Jan. 15, 1845 Feb. 7, 1845	"Postponed." Withdrawn.
John M. Read	W. 28; D. 25	Feb. 7, 1845		No action.
James K. Polk				
George W. Woodward	D. 31; W. 25	Dec. 23, 1845	Jan. 22, 1846	Rejected, 20–29.
Millard Fillmore				
Edward A. Bradford	D. 35; W. 24	Aug. 16, 1852		No action.
George E. Badger	D. 35; W. 24	Jan. 10, 1853	Feb. 11, 1853	"Postponed."
William C. Micou	D. 35; W. 24	Feb. 24, 1853		No action.
James Buchanan				
Jeremiah S. Black	D. 36; R. 26	Feb. 5, 1861	Feb. 21, 1861	Rejected, 25–26.
Andrew Johnson				
Henry Stanbery	R. 36; D. 26	Apr. 16, 1866		No action.
Ulysses S. Grant				
Ebenezer R. Hoar	R. 56; D. 11	Dec. 15, 1869	Feb. 3, 1870	Rejected, 46–11.
Edwin M. Stanton	R. 56; D. 11	Dec. 20, 1869	Dec. 20, 1869	Confirmed (d. Dec. 24, 1869).
George H. Williams, C.J.	R. 49; D. 19	Dec. 1, 1873	Jan. 8, 1874	Withdrawn.
Caleb Cushing, C.J.	R. 49; D. 19	Jan. 10, 1874	Jan. 13, 1874	Withdrawn.
Rutherford B. Hayes				
Stanley Matthews[4]	D. 42; R. 33	Jan. 26, 1881		No action.
Chester A. Arthur				
Roscoe Conkling	R. 37; D. 37	Feb. 24, 1882	Mar. 2, 1882	Confirmed; declined.
Grover Cleveland				
William B. Hornblower	D. 44; R. 38	Sept. 17, 1893	Jan. 15, 1894	Rejected, 24–30.
Wheeler H. Peckham	D. 44; R. 38	Jan. 22, 1893	Feb. 16, 1894	Rejected, 32–41.
Herbert Hoover				
John J. Parker	R. 56; D. 39	Mar. 21, 1930	May 5, 1930	Rejected, 39–41.

TABLE 2.—SUPREME COURT NOMINATIONS REJECTED OR REFUSED—Continued

[In the following tabulation, details on the nominations to the Supreme Court of the United States which were declined by the nominees or acted on adversely by the Senate have been summarized. The political composition of the Senate at the time of such action is shown by major parties only: F.—Federalist; A.-F.—Anti-Federalist; D.R.—Democratic Republican; N.R.—National Republican; W.—Whig; D.—Democratic; R.—Republican.]

President and Supreme Court nominee	Senate composition	Date of nomination	Action on nomination	Nature of action
Lyndon B. Johnson				
Abe Fortas, C.J.	D. 64; R. 36	June 27, 1968	Oct. 7, 1968	Withdrawn.
Homer Thornberry[5]	D. 64; R. 36	June 27, 1968	Oct. 7, 1968	Withdrawn.
Richard M. Nixon				
Clement F. Haynsworth, Jr.	D. 58; R. 42	Sept. 4, 1969	Nov. 21, 1969	Rejected, 45-55.
G. Harrold Carswell	D. 58; R. 42	Jan. 19, 1970	April 7, 1970	Rejected, 45-51.

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[1] Paterson's name was inadvertently submitted before his term as Senator had expired, he having been a member of the Senate which created the Court positions under the Judiciary Act of 1789, 1 Stat. 73.

[2] Rutledge was commissioned, sworn in and presided over the August, 1795, Term of the Court.

[3] The Senate rejected the nomination as an attempt to control the Court through Taney's Cabinet affiliation. In the 1836 election, with six additional states voting, the Democrats won control of the Senate. Taney was renominated, this time for Chief Justice, and was confirmed, 29-15.

[4] The nomination, caught between Democratic control of the Senate and Senator Conkling's fight with Hayes, was pigeonholed. In the new Senate, Democrats and Republicans were evenly divided. Garfield promptly resubmitted Matthews' name, and he was confirmed, 24-23.

[5] The Senate never reached this nomination, as it was tied to the effort to advance Fortas to Chief Justice.

From Swindler at 536.

TABLE 3.—PRIOR JUDICIAL EXPERIENCE OF U.S. SUPREME COURT JUSTICES AND THEIR SUBSEQUENT SERVICE

Justice	Year Nominated	Number of Years of Prior Judicial Experience			Years of Service on Supreme Court
		Federal	State	Total	
Jay[*]	1789	0	2	2	6
J. Rutledge[*][†]	[*]1789 and 1795	0	6	6	[**]2
Cushing	1789	0	29	29	21
Wilson	1789	0	0	0	9
Blair	1789	0	11	11	7
Iredell	1790	0	½	½	9
T. Johnson	1791	0	1½	1½	2
Paterson	1793	0	0	0	13
S. Chase	1796	0	8	8	15
Ellsworth[*]	1796	0	5	5	4
Washington	1798	0	0	0	31
Moore	1799	0	1	1	5
Marshall [*]	1801	0	0	0	34½
W. Johnson	1804	0	6	6	30
Livingston	1806	0	0	0	17
Todd	1807	0	6	6	20
Story	1811	0	0	0	34
Duval	1811	0	6	6	24
Thompson	1823	0	16	16	20
Trimble	1826	9	2	11	2

TABLE 3.—PRIOR JUDICIAL EXPERIENCE OF U.S. SUPREME COURT JUSTICES AND THEIR SUBSEQUENT SERVICE—Continued

Justice	Year Nominated	Number of Years of Prior Judicial Experience			Years of Service on Supreme Court
		Federal	State	Total	
McLean	1829	0	6	6	32
Baldwin	1830	0	0	0	14
Wayne	1835	0	5	5	32
Taney*	1836	0	0	0	28
Barbour	1836	6	2	8	5
Catron	1837	0	10	10	28
McKinley	1837	0	0	0	15
Daniel	1841	4	0	0	19
Nelson	1845	0	22	22	27
Woodbury	1845	0	6	6	6
Grier	1846	0	13	13	24
Curtis	1851	0	0	0	6
Campbell	1853	0	0	0	8
Clifford	1858	0	0	0	23
Swayne	1862	0	0	0	19
Miller	1862	0	0	0	28
Davis	1862	0	14	14	15
Field	1863	0	6	6	34½
S. P. Chase*	1864	0	0	0	9
Strong	1870	0	11	11	10
Bradley	1870	0	0	0	22
Hunt	1872	0	8	8	10
Waite*	1874	0	0	0	14
Harlan, Sr.	1877	0	1	1	34
Woods	1880	12	0	12	7
Matthews	1881	0	4	4	8
Gray	1881	0	18	18	21
Blatchford	1882	15	0	15	11
L. Q. C. Lamar	1888	0	0	0	5
Fuller*	1888	0	0	0	22
Brewer	1889	6	22	28	21
Brown	1890	16	0	16	16
Shiras	1892	0	0	0	11
H. E. Jackson	1893	7	0	7	2
White*	*1894 and 1910	0	1½	1½	27
Peckham	1895	0	9	9	14
McKenna	1898	5	0	5	27
Holmes	1902	0	20	20	30
Day	1903	4	3	7	19
Moody	1906	0	0	0	4
Lurton	1909	16	10	26	5
Hughes*††	*1910 and 1930	0	0	0	17
Van Devanter	1910	7	1	8	27
J. R. Lamar	1910	0	2	2	6
Pitney	1912	0	11	11	10
McReynolds	1914	0	0	0	27
Brandeis	1916	0	0	0	23
Clarke	1916	2	0	2	6
Taft*	1921	8	5	13	9
Sutherland	1922	0	0	0	16
Butler	1922	0	0	0	17

TABLE 3.—PRIOR JUDICIAL EXPERIENCE OF U.S. SUPREME COURT JUSTICES AND THEIR SUBSEQUENT SERVICE—Continued

Justice	Year Nominated	Number of Years of Prior Judicial Experience			Years of Service on Supreme Court
		Federal	State	Total	
Sanford	1923	14	0	14	7
Stone*††	*1923 and 1941	0	0	0	23
Roberts	1930	0	0	0	15
Cardozo	1932	0	18	18	6
Black	1937	0	1½	1½	34
Reed	1937	0	0	0	19
Frankfurter	1939	0	0	0	23
Douglas	1939	0	0	0	36
Murphy	1940	0	7	7	9
Byrnes	1941	0	0	0	1
R. H. Jackson	1941	0	0	0	13
W. Rutledge	1943	4	0	4	6
Burton	1945	0	0	0	13
Vinson*	1946	5	0	5	7
Clark	1949	0	0	0	18
Minton	1949	8	0	8	7
Warren*	1953	0	0	0	16
Harlan	1955	1	0	1	16
Brennan	1956	0	7	7	....
Whittaker	1957	3	0	3	5
Stewart	1958	4	0	4	....
White	1962	0	0	0	
Goldberg	1962	0	0	0	3
Fortas	1965	0	0	0	4
Marshall	1967	3½	0	3½	....
Burger*	1969	13	0	13	
Blackmun	1970	11	0	11	....
Powell	1971	0	0	0	....
Rehnquist	1971	0	0	0	....
Stevens	1975	5	0	5	....

[*] Indicates Chief Justice and date of his appointment or promotion.

[†] Rutledge's nomination was rejected by the Senate in December 1795, but he had served as Chief Justice under a recess appointment for four months.

[**] Actually Rutledge never served as Associate Justice, although he did perform circuit duty before his resignation in 1791.

[††] Indicates no judicial experience when appointed as *Associate* Justice.

From Abraham at 45–47.

TABLE 4.—OCCUPATIONS* OF SUPREME COURT DESIGNEES AT TIME OF APPOINTMENT †

Federal Officeholder in Executive Branch	22
Judge of Inferior Federal Court	*** 21
Judge of State Court	21
Private Practice of Law	18
U.S. Senator	8
U.S. Representative	4
State Governor	3
Professor of Law	3
Associate Justice of U.S. Supreme Court **	2
Justice of the Permanent Court of International Justice	1

[*] Many of the appointees had held a variety of federal or state offices, or even both, prior to their selection.

[†] In general the appointments from state office are clustered at the beginning of the Court's existence; those from federal office are more recent.

[**] Justices White and Stone, who were *promoted* to the Chief Justiceship in 1910 and 1930, respectively.

[***] Does not include Justice John Paul Stevens, appointed 1975, formerly a judge of the U.S. Court of Appeals for the Seventh Circuit.

From Abraham at 53.

TABLE 5.—ACKNOWLEDGED RELIGION OF THE 100 INDIVIDUAL JUSTICES OF THE SUPREME COURT (AT TIME OF APPOINTMENT)*

Episcopalian	26
Unspecified Protestant	24
Presbyterian	17
Roman Catholic	6
Unitarian	6
Baptist	5
Jewish	5
Methodist	4
Congregationalist	3
Disciples of Christ	2
Lutheran	1
Quaker	1
	100

*Does not include Justice John Paul Stevens, appointed 1975.

From Abraham at 57.

TABLE 6.—THE 31 STATES FROM WHICH THE 103 SUPREME COURT APPOINTMENTS WERE MADE

New York	15	Minnesota	2
Ohio	9	North Carolina	2
Massachusetts	8	Iowa	2
Virginia	7	Michigan	2
Tennessee	6	New Hampshire	1
Pennsylvania	6	Maine	1
Kentucky	5	Mississippi	1
Maryland	4	Kansas	1
New Jersey	4	Wyoming	1
South Carolina	3	Utah	1
Connecticut	3	Texas	1
Georgia	3	Indiana	1
Alabama	3	Missouri	1
California	3	Colorado	1
Illinois	*3	Arizona	1
Louisiana	2		

*John Paul Stevens, who received the 104th successful presidential appointment to the Court, was from Illinois, thus raising that State's total to four.

From Abraham at 56.

TABLE 7.—OCCUPATIONAL BACKGROUNDS OF SUPREME COURT NOMINEES SINCE 1937

Nominee	Last occupation before appointment	Major occupation
Black	U.S. Senator	Politics.
Douglas	Securities and Exchange Commission	Law and teaching.
Frankfurter	Law school instructor	Law school instructor.
Reed	Solicitor General	Executive branch and private practice.
Jackson	Attorney General	Executive branch and private practice.
Stone	Supreme Court Justice	Executive branch and private practice.
Byrnes	U.S. Senator	Politics.
Murphy	Attorney General	Politics.
Rutledge	Appellate court	Law school dean and instructor.
Burton	U.S. Senator	Politics and private practice.
Vinson	Secretary of Treasury	Politics.
Minton	Appellate court	Politics.
Clark	Attorney General	Executive branch and private practice.
Warren	State Governor	Politics.
Harlan	Appellate court	Private practice.
Brennan	State court	Private practice and State judge.
Stewart	Appellate court	Private practice.
Whittaker	Appellate court	Private practice.
White	Assistant Attorney General	Private practice.
Goldberg	Secretary of Labor	Private practice.
Fortas	Private practice	Private practice with some experience in executive branch.
Marshall	Solicitor General	NAACP attorney and Federal bench.
Thornberry	Appellate court	Politics.
Burger	Appellate court	Private practice.
Haynsworth	Appellate court	Private practice.
Carswell	Appellate court	Private practice.
Blackmun	Appellate court	Private practice.
Powell	Private practice	Private practice.
Rehnquist	Assistant Attorney General	Private practice.
Stevens	Appellate court	Private practice.

Adapted from Ashby at 453.

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Effect of a Judicial Stay on Administrative Fund Termination Proceedings

Under the nondiscrimination provisions of the Omnibus Crime Control and Safe Streets Act of 1972, the administrative process by which funds are suspended or terminated is independent of any contemporaneous judicial proceeding, and a stay entered in the judicial proceeding thus has no effect on an administrative decision to suspend or terminate funds.

The Law Enforcement Assistance Administration is free to defer administrative fund suspension or termination proceedings during the pendency of a judicial stay, but is foreclosed from restoring funds that have already been suspended or terminated except in accordance with the procedures set forth in the Omnibus Crime Control and Safe Streets Act.

Under the nondiscrimination provisions of the Revenue Sharing Act, the Office of Revenue Sharing is required to suspend administrative enforcement proceedings, and to restore funds already suspended or terminated, whenever a stay is issued in the judicial proceeding that triggered the administrative enforcement action.

March 14, 1980

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

This responds to your request for our opinion on the effect of a stay pending appeal upon fund termination proceedings of the Office of Revenue Sharing (ORS) in the Department of the Treasury under the civil rights provisions of the State and Local Fiscal Assistance Act of 1972, as amended (Revenue Sharing Act), 31 U.S.C. § 1242, and upon the Law Enforcement Assistance Administration (LEAA) under the analogous provisions of the Omnibus Crime Control and Safe Streets Act of 1972, as amended (Crime Control Act), 42 U.S.C. § 3789d(c).* Both statutes include provisions that require the agencies to institute their own enforcement proceedings whenever they learn of a judicial or administrative determination that a recipient has discriminated in violation of federal law, and both provide for automatic suspension of funds to a recipient within a fixed time thereafter. The question has arisen whether a stay pending appeal of a lower court order vacates or defers administrative fund suspension.

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*NOTE: Under § 815(c) of the Justice Systems Improvement Act of 1979, Pub. L. No. 97-157, 93 Stat. 1167, 1206-09, the Office of Justice Assistance, Research and Statistics replaced LEAA as the entity responsible for administrative enforcement of the nondiscrimination provisions of the Crime Control Act. Ed.

Your division takes the position that a stay has the legal effect of vacating or deferring such suspension. Both the Department of the Treasury and LEAA disagree. The two agencies maintain that the administrative process by which funds are terminated under the two acts is independent of any contemporaneous judicial proceeding, whether or not the same issues of discrimination are involved, and whether or not their administrative process has been triggered in the first instance by a determination in the judicial proceeding. Therefore, in their view a stay entered in the judicial proceeding has no effect on an administrative decision to suspend funds. The Civil Rights Division memorandum takes the position that the administrative role under both statutes is merely "ancillary and supportive" of the judicial process, and that the agencies are therefore obliged "to honor" a judicial stay by suspending their administrative procedures or, if necessary, restoring the flow of federal funds.

For reasons stated hereafter, we agree with your Division's position on the effect of a stay on administrative fund suspension under the Revenue Sharing Act, but find merit in the position advanced by LEAA in interpreting its responsibilities under the Crime Control Act. We believe the law requires ORS, whose actions are triggered by and are to some extent dependent on a judicial determination, to conform its actions to those of a court granting a stay. And we think that Congress intended this administrative conformity to extend to the restoration of funds already suspended or terminated. Although neither the terms nor the legislative history of the relevant provisions of the Revenue Sharing Act deal with the effect of a stay on ORS proceedings, we believe that Congress intended to assure recipients of federal funds under that Act an opportunity to contest a preliminary determination of discrimination, and to avoid fund suspension by showing a likelihood of ultimate success on the merits. Because in federal court one of the grounds for granting a stay pending appeal in this context is precisely this likelihood of success on the merits,[1] we believe that Congress, had it considered

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[1] The Federal Rules of Civil Procedure provide that an interlocutory or final order in an action for an injunction will not be stayed except pursuant to the provisions of Rule 62(c). This provides in pertinent part that:

> when an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the adverse party.

Rule 8(a) of the Federal Rules of Appellate Procedure provides that a stay pending appeal ought in the first instance to be sought in the district court, but that a motion for relief may be made in the court of appeals where such a course is not practicable or where the district court has denied an application. Because a stay itself has the effect of an injunction or restraining order, the requirement in Rule 65(d) that it be accompanied by a statement of reasons has been held to apply. *See* Moore's Federal Practice § 62.05 at 62–21 through 22 (1979 ed.). An applicant for a stay pending appeal under FRCP Rule 62(c) or FRAP Rule 8(a) must make a "strong showing" that he will succeed on the merits of his appeal. *See Belcher* v. *Birmingham Trust Nat. Bank*, 395 F.2d 685 (5th Cir. 1968); *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Mandel* v. *HEW*, 417 F. Supp. 57

Continued

the issue, would not have approved the continuance of administrative procedures leading to fund termination in the face of a federal judicial stay and in disregard of it.

The analogous provisions of the Crime Control Act differ significantly from those of the Revenue Sharing Act, however, and in our view these differences make persuasive LEAA's argument that its own administrative process was intended by Congress to be independent of any concurrent litigation involving the same issues of discrimination. At the same time, we believe that LEAA is free under its statute to defer administrative fund suspension in the event of a judicial stay, and that sound policy may in some cases dictate such deferral. Unlike ORS, however, LEAA is probably foreclosed from restoring funds that have already been suspended or terminated except in accordance with the procedures set forth in its statute.

Because the relevant provisions of the two statutes differ markedly, and because our conclusions with respect to their import for the two agencies differ correspondingly, we discuss them separately.

I. The Crime Control Act

Section 518(c)(1) of the Crime Control Act, 42 U.S.C. § 3789d(c)(1), prohibits discrimination on grounds of race, color, religion, national origin or sex, by a state or local government, in a program or activity receiving funds under a grant administered by LEAA. Section 518(c)(2), 42 U.S.C. § 3789d(c)(2), which was added to the Act in 1976 by Pub. L. No. 94-503, 90 Stat. 2418, sets out the administrative procedures by which the nondiscrimination provisions in the preceding paragraph are enforced. In relevant part these require LEAA, upon receiving notice of a "finding" by a federal or state court or administrative agency to the effect that there has been a "pattern or practice" of discrimination in violation of subsection (c)(1), to set in motion an administrative procedure leading to suspension and, ultimately, termination of funds. Under this procedure LEAA must notify the chief executive of the affected governmental unit that a program or activity has been found not to be in compliance, and must request that officer to secure compliance. 42 U.S.C. §§ 3789d(c)(2)(A)(i) and (ii). If after 90 days compliance has not been secured, and if an administrative law judge has not "made a determination under subparagraph (F) that it is likely the state government or unit of local government will prevail on the merits," LEAA "shall notify" the Attorney General that compliance has not been secured "and caused [sic] to have suspended further payment of any funds under this chapter to that program or activity."

(D. Md. 1976). Professor Moore states that where a court of appeals grants a stay of an interlocutory order, "the grant of such a stay seems tantamount to deciding that the interlocutory injunction was improperly granted." Moore's Federal Practice, § 62.05 at 62-26.

42 U.S.C. § 3789d(c)(2)(C). The "determination under subparagraph (F)" is explained in that section as follows:

> Prior to the suspension of funds under subparagraph (C), but within the ninety day period after notification under subparagraph (C), the State government or unit of local government may request an expedited preliminary hearing on the record in accordance with section 554 of title 5, in order to determine whether it is likely that the State government or unit of local government would, at a full hearing under subparagraph (G), prevail on the merits of the issues of alleged noncompliance. A finding under this subparagraph by the administrative law judge in favor of the State government or unit of local government shall defer the suspension of funds under subparagraph (C) pending a finding of noncompliance at the conclusion of the hearing on the merits under subparagraph (G).

At the "full hearing" under subparagraph (G) referred to in this section, the issues of discrimination are heard on the merits, and LEAA must make "a finding of compliance or noncompliance." If LEAA makes a finding of "noncompliance," the Attorney General "may" terminate the payment of funds. 42 U.S.C. § 3789d(c)(2)(G)(ii).

Once funds have been suspended by LEAA there are only four circumstances, set out in subparagraph (D), under which payment may be resumed: (1) if the recipient enters into a compliance agreement approved by LEAA and the Attorney General; (2) if the recipient "complies fully with the final order or judgment" of a court or administrative agency, if that order or judgment covers all the matters raised in LEAA's original notice of noncompliance; (3) if the recipient "is found to be in compliance with subsection (c)(i) by such court";[2] and (4) if after a hearing LEAA finds "that noncompliance has not been demonstrated." [3] 42 U.S.C. §§ 3789d(c)(2)(D)(i) through (ii).

This statutory scheme suggests an intention on the part of Congress to limit agency discretion in certain respects (e.g., mandatory commencement of proceedings upon notice of a "finding," and mandatory suspension of funds 90 days thereafter); at the same time, it permits LEAA to reach its own independent conclusions on the issues of discrimination raised, and ultimately to make an independent decision to lift or continue a suspension pending a full administrative hearing on the merits of the discrimination charge, by showing a likelihood of success at a preliminary hearing. But the statute does not spell out what relationship if any Congress intended there to be between LEAA's enforcement procedures once they have been set in motion, and any ongoing judicial or administrative proceedings which may have triggered them in the first place.

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[2] The statute inexplicably fails to give the same effect to a similar finding of an administrative agency.

[3] Subparagraph (D) makes reference to a hearing "pursuant to subparagraph (F)." But subparagraph (F) describes the "expedited preliminary hearing" before an administrative law judge. It is subparagraph (G) which describes the full hearing in which LEAA determines the issue of compliance on the merits. We think the reference in subparagraph (D) to subparagraph (F) is mistaken, and that it should instead be read as a reference to the hearing described in subparagraph (G).

The legislative history of the 1976 amendments to the Crime Control Act does little to clarify this relationship. It manifests congressional dissatisfaction with the lack of initiative shown by LEAA in enforcing the nondiscrimination provisions of the Act, and an intent to remedy this by forcing the agency into action whenever a court or another agency "finds" the recipient to have engaged in a "pattern or practice" of discrimination. Thereafter, however, it would appear that LEAA was perceived as having an enforcement role independent of contemporaries and related court proceedings. The House report states that "the Committee bill will require the Administration to honor the discrimination findings of State and Federal courts and State and Federal agencies *by then beginning its own enforcement process* with the sending out of noncompliance notices to recipients found by others to have discriminated." H.R. Rep. No. 1155, 94th Cong., 2d Sess. 26 (1976) (emphasis added).[4]

The more important evidence of LEAA's independence comes from a reading of the statute itself, and from a comparison of its provisions with the analogous provisions of the Revenue Sharing Act. Unlike the Revenue Sharing Act, the Crime Control Act contains no provisions requiring deference on the merits to the triggering "finding" in any part of the administrative process. Rather, it would seem that this "finding" operates on the agency only to spur it into "beginning its own enforcement process." [5] As will be discussed in greater detail below, the analogous sections of the Revenue Sharing Act are considerably more explicit with respect to the further substantive effect that should be given the triggering judicial determination.

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[4] The Senate bill had made no changes in the nondiscrimination provisions of the Crime Control Act, and the conference committee reported out provisions that were in all pertinent respects identical to those in the House bill. *See* H.R. Rep. No. 1723, 94th Cong., 2d Sess. 32 (1976).

[5] One of the difficulties in construing LEAA's obligations under these provisions of the statute is Congress' failure to define what it meant by a "finding." It is not clear in the statute or its legislative history whether this term was meant to include preliminary or interlocutory "findings," or whether it should be limited to formal findings after a full hearing. LEAA's own regulations do not define the term, but that agency has apparently interpreted it to include the findings embodied in a preliminary injunction order. If the "finding" is viewed solely as a triggering mechanism, then we would have no basis on which to quarrel with LEAA's expansive definition of the term. If, on the other hand, a "finding" were to be considered more or less determinative of the agency's own actions on the merits in connection with fund suspension, as it appears to be under the Revenue Sharing Act, we would be less comfortable with the notion that Congress intended to include in the term "finding" any statement or action of a court with respect to a complaint brought before it. *See* note 8 *infra.* It is precisely because under the Crime Control Act a court's "findings" are not substantively binding on LEAA that we are constrained to agree with that agency on the legal effect of a stay.

To be sure, the Crime Control Act provides that payment of suspended funds should be resumed if the recipient "complies fully with the final order or judgment" of a court. But, by implication, any court action short of a "final order or judgment" would in itself permit no such resumption. Therefore, when funds have already been suspended by LEAA, a stay in the related judicial proceeding does not, in our opinion, have any effect on the suspension. On the other hand, where funds have not yet been suspended and the agency inquiry is still under way, the statute does not appear to compel any particular agency response to developments in litigation involving the same issues. The opportunity provided the recipient in subparagraph (F) to defer suspension by demonstrating a likelihood of success on the merits before an administrative law judge suggests a general congressional policy underlying the Act which we think would permit LEAA to defer its own suspension proceedings where a stay has been granted by the court whose "findings" triggered those proceedings in the first place. This is, however, a matter of policy and not a matter of law.

In sum, based on our reading of § 518(c)(2) of the Crime Control Act and its legislative history, we agree with LEAA that its administrative process is independent of the triggering judicial or administrative proceedings; that suspended funds may be resumed only upon the happening of one of the events specified in subparagraph (D); and in particular that it is not required under the statute to bring its own administrative process to a halt in the event a stay is obtained in a contemporaneous and related judicial proceeding. On the other hand, we do not think LEAA is precluded from taking into account the implications of a stay order in the course of its own pre-suspension proceedings. The congressional policy reflected in subparagraph (F) would fully support a decision by LEAA to honor such a stay, and defer suspension pending a full administrative hearing on the merits. Indeed, we think in some circumstances LEAA would not be remiss in its responsibilities under the statute in deferring all administrative action pending a resolution of the issues raised in the court proceeding.[6]

II. The Revenue Sharing Act

The 1976 amendments to the Revenue Sharing and Crime Control Acts were passed on October 13 and 15 of that year, respectively. In both cases Congress was seeking to strengthen the nondiscrimination enforcement provisions of prior law, and to provide mechanisms to compel the two agencies to commence proceedings looking toward termination of federal funds in the event a recipient state or local government were found by a court or agency to have discriminated in violation of federal law. The provisions intended to accomplish this objective in the two Acts turned out quite differently, however, primarily because the Senate took an active role in amending the Revenue Sharing Act and displayed little or no interest in the nondiscrimination provisions in the Crime Control Act. The House bills amending both Acts contained essentially identical enforcement provisions. These were enacted without substantive change into the Crime Control Act amendments, and without any separate contribution from the Senate. *See* note 4 *supra.* But the Senate had its own proposals to make with respect to the Revenue Sharing Act, proposals that were quite different from those of the House, and that were in the main accepted by the Conference Committee.

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[6] LEAA's own regulations appear to recognize the desirability of coordinating its enforcement efforts with contemporaneous litigation involving the same issues. For example, the regulations provide that if an LEAA complainant has also filed suit in federal or state court, and if the trial of the suit would be in progress during the LEAA investigation, LEAA "will suspend its investigation and monitor the litigation through the court docket and contacts with the complainant." 28 C.F.R. § 42.205(c)(5). In addition, when a triggering "finding" has been made more than 120 days before LEAA learns of it, notification of noncompliance will be deferred pending an inquiry into the current status of the case. 28 C.F.R. § 42.210(c).

The "compromise" [7] reached in conference between the House and Senate on the nondiscrimination enforcement programs of the Revenue Sharing Act was enacted into § 122 of the Act by Pub. L. 94–448, 90 Stat. 2350, and is codified in § 1242 of title 31. A brief review of its pertinent provisions shows how the Senate's approach differed from that of the House in the Crime Control Act. Like the analogous provisions of the Crime Control Act, § 122(b)(1) contains a triggering mechanism for the commencement of administrative enforcement proceedings leading to fund termination. This triggering mechanism is described in § 122(c)(1) as a "holding" by a federal or state court, or federal administrative law judge, that the recipient state government has discriminated in violation of federal law.[8] Once the Secretary of the Treasury has received notice of a "holding," a notice of noncompliance must be sent the recipient, and the fund termination procedure set in motion.[9] Subsections (b)(2) and (b)(3) describe a hearing procedure

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[7] 122 Cong. Rec. 34,099 (Sept. 30, 1976) (remarks of Rep. Drinan, a sponsor of the bill in the House).

[8] Unlike the triggering events in § 518(c)(2) of the Crime Control Act, the triggering events under the Revenue Sharing Act are not restricted to a "pattern or practice" determination, and no effect is given determinations of a State administrative agency.

[9] Although you have not asked our opinion on the issue of whether a "holding" under the Revenue Sharing Act includes an interlocutory order, we note the position of ORS that it *does* include such orders in reaching our ultimate conclusions on the effect of a stay of such an order. In its regulations, ORS defines a "holding" as "any finding of fact or conclusion of law . . . which has been litigated . . ." 31 C.F.R. § 51.67(a). ORS has taken the position that a preliminary injunction constitutes a "holding" for purposes of triggering its administrative fund suspension procedure, a position which we do not understand your Division to dispute. LEAA appears to take the same position with respect to a "finding" under the Crime Control Act. *See* note 5 *supra.*

We also note here that we do not think Congress intended to attach any particular significance to the use of the term "holding" in the Revenue Sharing Act, as opposed to the term "finding" used by the Crime Control Act. No difference between the two terms was asserted in Congress, and none has been claimed by either LEAA or ORS. As it happened, the term "holding" was the one employed by the Senate in its revenue sharing bill, and the term "finding" was employed by the House in both its crime control bill and its revenue sharing bill. The terms "holding" and "finding" are used inter-

Continued

before the Secretary of the Treasury and, if requested subsequently, an administrative law judge. It is at this point that the two statutes part ways. Where the two-step hearing procedure under the Revenue Sharing Act has been triggered by a "holding" on the issues of discrimination, the substance of this "holding" may not be collaterally attacked before either the Secretary or the administrative law judge. That is, the recipient may present evidence to the Secretary only on the issue of whether the program or activity in which discrimination is charged has been federally funded, and not on the merits of the discrimination charge itself. If the Secretary determines that federal funds are involved, and if the recipient then requests a further hearing before an administrative law judge, that officer too is precluded from addressing the discrimination issue on the merits. In case there remains any doubt, subsection (c)(2) restates the restrictions on the administrative process as follows:

> If there has been a holding described in paragraph [(c)(1)] with respect to a State government or a unit of local government, then, in the case of proceedings by the Secretary pursuant to subsection (b)(2) of this section or a hearing pursuant to subsection (b)(3) of this section with respect to such government, such proceedings or such hearings shall relate only to the question of whether the program or activity in which the exclusion, denial, discrimination, or violation occurred is funded in whole or in part with funds made available under subchapter I of this chapter. *In such proceedings or hearing, the holding described in paragraph* [*(c)(1)*] . . . *shall be treated as conclusive.*

31 U.S.C. § 1242(c)(2) (emphasis added). Unless the Secretary or administrative law judge finds that the program in which discrimination is charged is not federally funded, the Secretary "shall" suspend payment of funds.

Subsection (e) of the statute sets out the five grounds on which suspended payments may be resumed where a "holding" has triggered the suspensions: 1) if the recipient government enters into a compliance agreement with the government agency or office responsible for prosecuting the claim or complaint which is the basis for the holding, if the agreement has been approved by the Secretary;[10] 2) if the recipient government "complies fully with the holding," if that holding covers all matters raised in the Secretary's notice of noncompliance; 3) if the

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changeably in both the Senate report and the conference report on the revenue sharing bill, suggesting that that body did not focus at all on the difference, if any, between them. *See* S. Rep. No. 1207, 94th Cong., 2d Sess. 32 (1976); H.R. Rep. No. 1720, 94th Cong., 2d Sess. 35-36 (1976). Indeed, in discussing the conditions for resumption of funds both reports speak of compliance with an "order" of a federal court, where the statute uses the term "holding." *Id. See* 31 U.S.C. 1242(e)(2).

[10] The compliance agreement is described in subsection (d)(1).

recipient is found to be in compliance by the court or agency that issued the holding; 4) if the administrative law judge determines that the recipient is in compliance under subsection (b)(3)—a determination which may be based only on the presence or absence of federal funds, not the merits of the discrimination claim; and 5) if the body that has issued the triggering holding is reversed by an appellate tribunal. This final condition of lifting the suspension is also dealt with in subsection (c)(3):

> If a holding described in paragraph [(c)(1)] is reversed by an appellate tribunal, *then proceedings under subsection (b) of this section which are dependent upon such holding* shall be discontinued; any suspension or termination of payments resulting from such proceedings shall also be discontinued.

31 U.S.C. § 1242(c)(3) (emphasis added).

The acknowledgment in subsection (c)(3) that the administrative proceedings are "dependent" on the proceedings in the triggering body is reflected generally in the grounds for resumption of suspended payments described above. Three of the five grounds are for all practical purposes beyond the control of the Secretary: the first, a compliance agreement, is grounds for resumption of payment only where it is entered into by the parties to the triggering lawsuit or complaint. The third ground depends on the recipient's compliance as determined by the triggering body. And the fifth ground depends entirely on the action of an appellate tribunal in reversing the triggering holding. Although there is some independent role reserved to the agency with respect to the first, second, and fourth grounds, the agency is always bound to follow the lead of the triggering body whenever the merits of the discrimination issue are involved.

The congressional concern to limit the independent enforcement authority of the Secretary of the Treasury where there has been a prior holding of discrimination is reflected in the legislative history of the 1976 amendments to the Revenue Sharing Act. As with the Crime Control Act, Congress was aware of widespread dissatisfaction with the agency's failure to use its suspension power even where the recipient agency had been adjudged by a federal court to be in violation of the law. *See Hearings before the Subcommittee on Revenue Sharing of the Senate Finance Committee,* 94th Cong., 1st Sess. 173, 197, 214 (1975). *See also United States* v. *City of Chicago,* 395 F. Supp. 329 (N.D. Ill. 1975), *aff'd* 525 F.2d 695 (7th Cir. 1976). However, the Senate's contribution to the provisions that emerged in 1976 as the Conference "compromise" reflected equally strong concerns to minimize the burden of enforcement on ORS staff, and "to safeguard the due process rights of the recipient." S. Rep. No. 1207, 94th Cong., 2d Sess. 29 (1976). These concerns resulted in the development of provisions limiting the discretion of ORS where a court or federal agency proceeding was in progress.

The hearings in the Senate Finance Committee in August of 1976 took place after the House had reported out its bill amending the Revenue Sharing Act. That House bill contained nondiscrimination enforcement provisions virtually identical to those ultimately enacted in the Crime Control Act. The Senate committee was not satisfied with these provisions on two grounds: first, they placed too heavy an enforcement responsibility on the staff of the Office of Revenue Sharing, whose officers testified that they did not wish to assume a larger role in civil rights enforcement; and second, they failed to afford a recipient government adequate protection against administrative arbitrariness and duplicative hearings. The General Counsel of the Treasury Department testified that the elaborate procedures set forth in the House bill "would really require a multiplication of the staff with very little effect overall," and that "the mechanics set up in the House-passed bill would create tremendous administrative burdens." *Hearings before the Senate Committee on Finance on H.R. 13367,* 94th Cong., 2d Sess. 48–49 (1976). He recommended that more reliance be placed on the ability of a court to monitor compliance, and less on the independent ability of ORS to enforce the law. The committee also heard testimony from a number of state and local government officials. The comments of Patrick Lucey, Governor of Wisconsin, are typical:

> An ideal system of anti-discrimination enforcement would emphasize both due process and simplicity to preclude the federal government from arbitrarily suspending revenue sharing funds in any jurisdiction. Deadlines should be short, and findings of discrimination should be based on the administrative and judicial process which does not rely solely on the judgment of the Secretary of the Treasury.

Id. at 89. Kenneth Gibson, Mayor of Newark, New Jersey, complained that "federal civil rights enforcement requirements are oftimes duplicative and contradictory in nature." He recommended that "a strategy be developed to consolidate and coordinate federal civil rights enforcement in general and that due process be observed in any withholding of funds from local government." *Id.* at 92–93. In a colloquy with Senator Packwood, Mr. Gibson and John Poelker, Mayor of St. Louis, discussed the due process problems inherent in simultaneous and potentially contradictory administrative and judicial proceedings. Senator Packwood asked how to construct "a fair section" that would not "unduly penalize" a recipient during the pendency of a court suit. Poelker recommended that "[i]t should be left up to the decision of the court, not the Secretary. . . . As long as the suit is pending, and the locality has not been found in violation until that time," funds should not be suspended. Both Mayors Poelker and Gibson emphasized that in their opinion the inequity of terminating funds prior to "the end of the suit" outweighed the possibility of undesirable continuance of funds during its pendency. *Id.* at 77–78.

The general criticism of the House bill in the Senate committee led to the drafting of the provisions that eventually were enacted as § 122. The problems of delay, unfairness, and duplication that witnesses perceived to be inherent in the House approach were sought to be resolved by provisions linking the ORS administrative role more closely with proceedings brought before courts and other agencies. The Conference Committee accepted the Senate bill in all pertinent respects. H.R. Rep. No. 1720, *supra,* at 34.

From the foregoing discussion it is clear that the terms of the civil rights enforcement provisions of the Revenue Sharing Act and their legislative history are substantially different from those of the Crime Control Act. We believe these differences warrant a different conclusion with respect to the effect a stay on administrative fund suspension proceedings under the two acts. Under the Crime Control Act, once the administrative enforcement proceeding has been triggered by a "finding," LEAA operates independently of the finding. Under the Revenue Sharing Act, ORS proceedings are "dependent" from beginning to end on the concurrent judicial or federal agency proceedings. Since ORS is barred from making its own determination on the issue of discrimination once there has been a court determination, we think it must also respect the court's subsequent decision to stay the effect of that determination. This is consistent with the Senate's concern not to burden ORS staff with massive civil rights enforcement responsibilities, and to ensure recipient governments due process of law. In the case of LEAA, however, to the extent that that agency remains free to reach its own decision on the merits of the discrimination issues prior to suspending funds, we do not believe the law requires it to honor a judicial stay—although we also think that it may do so in its discretion.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Application of 18 U.S.C. §§ 203 and 205 to Federal Employees Detailed to State and Local Governments

Environmental Protection Agency (EPA) is correct in its view that detailing its employees to important positions in state agencies, the duties of which may require them to represent the state before the EPA, is integral to the substantive environmental programs that EPA administers.

Sections 203 and 205 of Title 18 were not intended to limit substantively the uses federal agencies may make of their employees, and a federal employee is performing "official duties," within the meaning of those provisions, when involved in a task that is integral to a substantive federal program.

Sections 203 and 205 do not prohibit EPA employees, detailed to a state agency pursuant to the Intergovernmental Personnel Act, from representing that agency before the EPA in the course of their assigned duties.

March 17, 1980

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, ENVIRONMENTAL PROTECTION AGENCY

This responds to your request that we reconsider the opinion, expressed in former Assistant Attorney General Rehnquist's letter of March 12, 1971, about the application of two conflict of interest statutes to federal employees detailed to states under the Intergovernmental Personnel Act, 5 U.S.C. §§ 3371-3376. Those two conflict of interest statutes, 18 U.S.C. §§ 203 and 205, prohibit Executive Branch employees from representing any party other than the United States before any federal agency in connection with a matter in which the United States has an interest.[1] Neither of these statutes applies, however, if the employee is acting in "the proper discharge of his official duties." In his 1971 letter, former Assistant Attorney General Rehnquist said that federal employees detailed to states under the Intergovernmental Personnel Act were not acting in the proper discharge of their official duties within the meaning of §§ 203 and 205 if they represented those states before a federal agency.

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[1] 18 U.S.C. § 203 provides in part:

> (a) Whoever, otherwise than as provided by law for the proper discharge of official duties, directly or indirectly receives or agrees to receive, or asks, demands, solicits, or seeks, any compensation for any services rendered or to be rendered either by himself or another—

* * * * *

Continued

The Environmental Protection Agency (EPA) details employees to state and local governments under the authority of the Intergovernmental Personnel Act and several environmental statutes. You specifically mention the Clean Air Act, 42 U.S.C. §§ 7401–7642 (Supp. III 1979), the Clean Water Act, 33 U.S.C. §§ 1251–1376, the Safe Drinking Water Act, 42 U.S.C. §§ 300f to 300j-9, the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901–6987, and the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136–136y. The detailed employees are assigned to aid the states in carrying out their responsibilities under these various environmental statutes. We understand that the employees' duties are specified in agreements signed between EPA and the state agencies, and in a briefing given to the employees.

A federal employee can, while acting on behalf of another party, have purely ministerial contacts with a federal agency without violating § 203 or § 205. *See* Memorandum Opinion for the Acting General Counsel, Nuclear Regulatory Commission, 2 Op. O.L.C. 313, 316–317 (1978); Federal Personnel Manual, ch. 334, subch. 1-9b, at 334-6 & n.1 (1973). But if the employee has any dealings with the government in an adversary context—that is, any contacts about a matter in which the Government and the party on whose behalf the employee is acting have inconsistent or potentially inconsistent interests—then the employee is representing that party and, unless otherwise excepted, is

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> (2) at a time when he is an officer or employee of the United States in the executive, legislative, or judicial branch of the Government . . .
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> in relation to any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest, before any department, agency, court-martial, officer, or any civil, military, or naval commission,
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> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned for not more than two years or both; and shall be incapable of holding any office of honor, trust, or profit under the United States.

18 U.S.C. § 205 provides, in part:

> Whoever, being an officer or employee of the United States in the executive, legislative, or judicial branch of the Government or in any agency of the United States, including the District of Columbia, otherwise than in the proper discharge of his official duties—
>
> * * * * *
>
> (2) acts as agent or attorney for anyone before any department, agency, court, courtmartial, officer, or any civil, military, or naval commission in connection with any proceeding, application, request for a ruling or other determination, contract, claim, controversy, charge, accusation, arrest, or other particular matter in which the United States is a party or has a direct and substantial interest—
>
> Shall be fined not more than $10,000 or imprisoned for not more than two years, or both.

It may appear at first glance that § 203(a) proscribes all services rendered in connection with a proceeding before a federal agency, while § 205 prohibits only acting "as agent or attorney." But the Department of Justice has consistently interpreted § 203 to apply only to "services rendered . . . before any department [or] agency"—that is, to representative activities comparable to acting as an agent or attorney. *See* Memorandum of Attorney General Regarding Conflict of Interest Provisions of Public Law 87-849, reprinted in 18 U.S.C. § 201 note at 1029 (1976); S. Rep. No. 2213, 87th Cong., 2d Sess. 9-11 (1962); Perkins, *The New Federal Conflict of Interest Law*, 76 Harv. L. Rev. 1113, 1144–45 (1963).

violating §§ 203 and 205. We advised you of this interpretation of §§ 203 and 205. You replied that EPA's detailed employees cannot be confined to ministerial contacts with EPA. You said that EPA's ability to cooperate with the states in the way Congress envisioned will be seriously impaired if detailed employees cannot represent states before the EPA in contexts that are potentially adversary. You now ask us to reconsider the 1971 opinion and to say that such a detailed EPA employee would be engaged in "the proper discharge of official duties" and therefore may represent a state before the EPA.

For the reasons we state below, we accept your judgment that it is integral to the statutory schemes established by Congress that detailed EPA employees be able to represent states, from time to time, in dealings with EPA. We believe that a federal employee performing a task that is integral to the statutory scheme administered by the employee's agency is engaged in "the proper discharge of his official duties" within the meaning of §§ 203 and 205. For these reasons, as long as EPA employees detailed under the statutes you mention are performing their assigned duties, §§ 203 and 205 do not prohibit them from representing states in dealings with the EPA. A federal employee can be assigned to a state under the Intergovernmental Personnel Act, however, whenever he will be performing "work of mutual concern to his agency and the State or local government that [the federal agency] determines will be beneficial to both." 5 U.S.C. § 3372 (a) (Supp. III 1979). "Work of mutual concern" will not always be work integral to a substantive federal program. Thus we have no occasion to consider, at this time, whether every federal employee detailed to another entity under the Intergovernmental Personnel Act can represent that entity in dealings with the federal government.

I. The Role of Detailed EPA Employees in Implementing Environmental Statutes

We agree with your judgment that detailing EPA employees to important positions in state agencies is integral to the substantive environmental programs Congress enacted. These programs encourage, and require, EPA to provide technical assistance to the states. In approving the Safe Drinking Water Act, for example, the House committee commented: "[I]t is abundantly clear that additional Federal assistance, research, and support is necessary in order to enable State and local efforts to provide safe water to be successful." H.R. Rep. No. 1185, 93d Cong., 2d Sess. 9 (1974). *See also id.* at 38; S. Rep. No. 1196, 91st Cong., 2d Sess. 4 (1970) (Clean Air Act). In particular, Congress knew that earlier environmental programs had foundered because state agencies lacked the expertise they needed to implement the programs effectively. H.R. Rep. No. 1146, 91st Cong., 2d Sess. 5 (1970); Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Imple-*

mentation of National Environmental Policy, 86 Yale L. J. 1196, 1201 (1977). Each of the statutes you mentioned in your January 30 letter authorizes the EPA to detail employees to provide this expertise. *See* 42 U.S.C. § 7601(b) (Clean Air Act); 33 U.S.C. § 1361(f) (Clean Water Act); 42 U.S.C. § 300j–9(c) (Safe Drinking Water Act); 42 U.S.C. § 6981(c)(4) (Resource Conservation and Recovery Act); 7 U.S.C. § 136u (Federal Insecticide, Fungicide, and Rodenticide Act). You have told us that in EPA's judgment, Congress' intentions cannot be fulfilled unless detailed EPA employees occupy important positions in state agencies—positions in which they will be involved in the central functions of those agencies. Congress did not expressly require EPA to detail its employees to important positions in state agencies. But Congress directed EPA to provide technical assistance and, in framing the environmental laws administered by EPA, expressly or implicitly authorized detailing as one way of doing so. In view of these indications of Congress' intentions, we accept EPA's judgment that detailing employees to important positions in state agencies is integral to the success of the programs it administers.

In many programs, employees involved in the central functions of state agencies might not have to deal with the federal government, or might not have to deal with it in an adversary or representational context. EPA's programs, however, are not among these. One of the central functions of state agencies under federal environmental laws is to have close, ongoing, substantive contacts of a somewhat adversary nature with EPA. It is a commonplace, for example, that the environmental statutes you mention in your letter establish a "delicate partnership" between the EPA and state environmental agencies. *See, Save the Bay, Inc.* v. *Administrator of the EPA*, 556 F.2d 1282, 1284 (5th Cir. 1977) (Clean Water Act). The legislative history of the Safe Drinking Water Act describes it as "a cooperative effort in which the Federal government assists, reinforces, and sets standards for the State and local efforts . . . [T]he Federal government must bear a shared responsibility with State and local governments." H.R. Rep. No. 1185, 93d Cong., 2d Sess. 8, 9 (1974). Congress considered this partnership to be a central feature of these statutes. *See, e.g.*, H.R. Rep. No. 294, 95th Cong., 1st Sess. 1 (1977) (Clean Air Act Amendments); S. Rep. No. 1196, 91st Cong., 2d Sess. 4, 12, 21 (1970) (Clean Air Act); H.R. Rep. 1491, 94th Cong., 2d Sess. 31 (1976) (Resource Conservation and Recovery Act) (suggesting that "federal-state relationship" is the "key" to Act); *id.* at 5, 24–25, 30. The statutes themselves reveal the details of the relationship between EPA and the states; unsurprisingly, continual substantive contacts are a vital feature of it. Moreover, the statutes envision that EPA and the states will often have divergent interests, so their contacts will necessarily be somewhat adversary.

Under the Clean Water Act, for example, EPA initially has the authority to issue the permits that a polluter must have before it discharges effluents. 33 U.S.C. §§ 1311(a), 1342(a). Once a state has established an overall permit program that meets federal standards, 33 U.S.C. § 1342(b), it can issue these permits itself. 33 U.S.C. § 1342(e)(1). The EPA, however, can veto individual state permits, 33 U.S.C. § 1342(d), and can revoke the state's authority to issue permits if the state program consistently fails to meet federal standards, 33 U.S.C. § 1342(c)(3). As you note in your January 30 letter, Congress foresaw that in administering this program the EPA and the state agencies would have frequent substantive contacts of an adversary sort. *See, e.g.*, S. Rep. No. 414, 92d Cong., 1st Sess. 7–10 (1971).

The Resource Conservation and Recovery Act provides, in a roughly similar fashion, that a state may take over the administration of the hazardous waste disposal program from the federal government, unless the EPA determines that the state program is inadequate. 42 U.S.C. § 6926(e). Congress established this relationship because it realized that federal and state interests would not always coincide. *See* H.R. Rep. No. 1491, 94th Cong., 2d Sess. 30 (1976). And Congress envisioned close and continual contacts between federal and state agencies. *See id.* at 5. The Safe Drinking Water Act establishes a scheme that is similar in many respects to that of the Resource Conservation Act. *See* 42 U.S.C. §§ 300g–2, 300g–3. Congress thought that while "cooperation will be the rule," the EPA would act as a check on the state agencies; the House committee attempted to specify the scope of EPA review. H.R. Rep. No. 1185, 93d Cong., 2d Sess. 2, 21 (1974). The Federal Insecticide, Fungicide, and Rodenticide Act provides for a relationship between the EPA and the states that somewhat resembles the Clean Water Act's permit program. *See* 7 U.S.C. § 136v. *See also* 7 U.S.C. § 136p (in an emergency, EPA can exempt state agency from provisions of Act).

Other aspects of these statutes also contemplate continual substantive contacts between state and federal agencies. Under the Clean Water Act, states can establish water quality standards but EPA reviews them. 33 U.S.C. § 1313. State implementation plans under the Clean Air Act are also subject to EPA review and revision. 42 U.S.C. § 7410. Again, Congress envisioned a somewhat adversary relationship. *See* H.R. Rep. No. 294, 95th Cong., 1st Sess. 27 (1977); S. Rep. No. 1196, 91st Cong., 2d Sess. 21 (1970). Similarly, as your letters note, EPA can delegate to the states its power under the Clean Water Act to make grants to local governments to construct waste treatment facilities. 33 U.S.C. §§ 1281–1293(a). As you point out, the Act itself provides that "[i]t is the policy of Congress that the States manage the construction grant program." 33 U.S.C. § 1251(b). But you have advised us that EPA must supervise the states to ensure that they are discharging their responsibilities under the program.

Congress' reasons for establishing this sort of relationship between the EPA and state governments lie deep in the history of environmental legislation. For practical and legal reasons, state and local governments must plan and implement many environmental programs. For example, efforts to combat pollution must be coordinated with traffic controls and land-use regulation. In those areas, the states' knowledge and authority predominate. *See* Stewart, *supra*, at 1201; Tripp, *Tensions and Conflicts in Federal Pollution Control and Water Resource Policy*, 14 Harv. J. Legis. 225, 253–57, 278–80 (1977). But for technical and political reasons, state governments have often been unable or unwilling to perform their tasks effectively; the federal government must induce them to do so. *See, e.g.*, S. Rep. No. 414, 92d Cong., 1st Sess. 4–5 (1971) (Clean Water Act); Stewart, *supra*, at 1201–02. Thus close and somewhat adversary contacts between EPA and state environmental agencies are an essential, not an incidental, aspect of environmental legislation. Detailing EPA employees to important positions in state agencies is integral to the programs created by that legislation. It follows, from the close, ongoing, adversary relationship which those programs establish between the federal and state agencies, that it is also integral to the programs that detailed EPA employees be able to represent the states in dealings with the EPA.

II. "Official Duties" Under §§ 203 and 205

For several reasons, we believe that federal employees are performing "official duties," within the meaning of §§ 203 and 205, when they are involved in tasks that are integral to a substantive federal program. The legislative history of the "official duties" exception to §§ 203 and 205 is obscure, but the term "official" suggests that those statutes are aimed primarily at actions taken by federal employees in their private capacities. The House committee that studied the most recent amendment to §§ 203 and 205 said that they were designed to prevent any "conflict between private interests of a Government employee and his duties as an official," and that the "evident reason" for the restriction now found in § 205 was to prevent employees "from using . . . influence in support of private causes." H.R. Rep. No. 748, 87th Cong., 1st Sess. 6, 21 (1961). The Senate committee referred to § 205 as a "bar against a Government employee's private representational activities." S. Rep. No. 2213, 87th Cong., 2d Sess. 11 (1962). *See* Perkins, *The New Federal Conflict of Interest Law*, 76 Harv. L. Rev. 1113, 1143 (1963).[2]

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[2] Activities on behalf of a state or some other unit of government can be "private" if they are no part of a federal employee's job. We believe that detailed EPA employees' activities on behalf of the state agencies are not private, but that is true only because EPA has directed the employees to engage

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Moreover, nothing in the background or legislative history of §§ 203 and 205 suggests that they were intended substantially to limit the uses federal agencies may make of their employees. In this respect, they may contrast with, for example, 18 U.S.C. § 208 (Supp. III 1979), which restricts federal employees' participation in matters in which they have a financial interest. The "official duties" exception in fact suggests that Congress did not intend to limit the ability of federal agencies to assign their employees to tasks that would involve their representing other parties. In general, had Congress wanted significantly to restrict the manner in which an agency uses its employees, Congress is unlikely to have chosen as its means a criminal statute, directed at the employees themselves, and containing an exception for "the proper discharge of official duties."[3]

For these reasons, we do not believe that §§ 203 and 205 can be read to prohibit a federal agency from assigning its employees to tasks that are integral to the programs for which it is responsible, even if those employees must, in the course of carrying out their assignments, represent other parties before the federal government.[4] As we have said, we

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in such activities. That acts are done on behalf of another government would not automatically exempt them from §§ 203 and 205. In saying this, however, we do not wish to foreclose the possibility that actions done on behalf of another unit of government might, in some circumstances, have a different status under the conflict of interest laws. This is an issue we do not reach.

[3] Section 105 of the Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2208 (1975), permits federal employees detailed to Indian tribes under the Intergovernmental Personnel Act, 5 U.S.C. § 3371(2)(c), to act as agents or attorneys on behalf of such tribes, notwithstanding § 205. Section 105(j) provides in part:

> Anything in sections 205 and 207 of title 18 to the contrary notwithstanding, officers and employees of the United States assigned to an Indian tribe as authorized under [the Intergovernmental Personnel Act] and former officers and employees of the United States employed by Indian tribes may act as agents or attorneys for or appear on behalf of such tribes in connection [with] any matter pending before any department, agency, court, or commission, including any matter in which the United States is a party or has a direct and substantial interest.

25 U.S.C. § 450i(f). (Section 207 of Title 18 imposes certain restrictions on former government employees' appearances before government agencies.) It might be argued that Congress' exempting this class of detailed employees from the prohibitions of § 205 implies that all other detailed employees are subject to those prohibitions. For several reasons, however, we do not adopt that view.

The exemption was added, by the House Committee on Interior and Insular Affairs, to a bill that had passed the Senate. *See* H.R. Rep. No. 1600, 93d Cong., 2d Sess. 21 (1974). The House committee commented simply that §§ 205 and 207 "would be inappropriate to the circumstances of" the detailing arrangements it was considering. *Id.* at 21. Apparently it did not consider the issue at length; for example, it neglected to exempt detailed employees from § 203, an evident oversight. Apparently it was most concerned with the exemption from § 207. *See id.* at 16-17. The Committee on Interior and Insular Affairs also gave no indication that it was aware of other programs involving detailed employees which might similarly claim to be hampered by §§ 203 and 205. The Committee did not seem to be guided by any coherent or principled conception of the coverage of the conflict of interest laws of the breadth of the "official duties" exception.

Under these circumstances, we cannot say that in enacting this exemption, Congress meant to express a considered view that no other tasks performed by detailed employees are "official duties" within the meaning of §§ 203 and 205. It seems more likely that the House Committee was alerted to the danger that § 205 might perhaps interfere with its substantive program of aiding Indian tribes and prudently acted to remove the danger, without considering the implications of its actions. Similarly, there is no sign that when Congress passed the Act that it thought it was legislating about any subject other than Indians.

[4] With your approval, we have discussed this matter with the Office of General Counsel at the Office of Personnel Management. The Office of General Counsel concurs in our interpretation of these

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accept your judgment that EPA employees detailed to important state positions are performing tasks integral to EPA's programs. Sections 203 and 205 therefore do not prohibit such employees from representing the state before the EPA in the course of their assigned duties.

There is an additional reason for concluding that the activities of EPA's detailed employees should not be circumscribed by §§ 203 and 205. The purpose of applying §§ 203 and 205 to detailed EPA employees would be to prevent them from using, on behalf of the state to which they are detailed, whatever influence they have within the EPA. *See* H.R. Rep. No. 748, 87th Cong., 1st Sess. 21 (1961). As we have discussed, however, environmental legislation places EPA and the states in a "delicate partnership." Often Congress attempted to specify in some detail the extent to which EPA was to review the actions of the state agencies. *See, e.g.*, H.R. Rep. No. 1185, 93d Cong., 2d Sess. 21 (1974) (Safe Drinking Water Act); H.R. Rep. No. 1491, 94th Cong., 2d Sess. 24–25 (1976) (Resource Conservation and Recovery Act); *compare* H.R. Rep. No. 911, 92d Cong., 2d Sess. 127 (1972) (Clean Water Act) *with* S. Rep. No. 414, 92d Cong., 1st Sess. 71 (1971) (Clean Water Act). In framing environmental legislation, Congress established an elaborate relationship between the federal and state agencies; we believe that questions about the degree to which those agencies may properly influence each other should be resolved by examining the policies underlying this relationship Congress has so carefully structured,[5] instead of by resorting to conflict of interest statutes.

For these reasons, we believe that EPA employees detailed to state agencies under the statutes you mention may, in the course of performing their assigned duties, represent the states in dealings with the EPA.

Larry A. Hammond
Acting Assistant Attorney General
Office of Legal Counsel

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conflict of interest statutes as they affect the operation of the Intergovernmental Personnel Act. It has advised us that the applicable provisions of the Federal Personnel Manual, ch. 334, subch. 1–9b, at 334–6, will be revised to reflect our interpretation.

[5] It can be argued that the environmental statutes themselves restrict the informal influence that EPA may exert on state agencies. *See* Case Comment, *Jurisdiction to Review Informal EPA Influence Upon State Decisionmaking under the Federal Water Pollution Control Act*, 92 Harv. L. Rev. 1814 (1979). Presumably, this would include influence exerted by exchanging or detailing employees. We of course express no opinion about the soundness of this view.

Applicability of Statutes Prohibiting Strikes Against the Federal Government to Cooperative Extension Agents

Statutes prohibiting strikes by federal employees against the federal government do not apply where Cooperative Extension Agents participate in a strike against their university employer.

March 20, 1980

MEMORANDUM OPINION FOR THE ACTING DIRECTOR, EXECUTIVE OFFICE FOR U.S. ATTORNEYS

This responds to the questions raised in the letter from the United States Attorney for the District of Hawaii, relating to the applicability of the statutes prohibiting strikes by employees of the federal government to certain individuals employed in the Cooperative Extension Service at the University of Hawaii. The Assistant General Counsel of the Department of Agriculture concluded in 1976 that the statutes in question operate to prohibit these individuals from joining a strike against the University. Although the matter is not free of doubt, we believe that Congress did not intend the no-strike statutes to reach this situation.

Section 7311 of Title 5 of the United States Code provides as follows:

> § 7311. Loyalty and striking
>
> An individual may not accept or hold *a position in the Government of the United States* or the government of the District of Columbia if he—
>
> (1) advocates the overthrow of our constitutional form of government;
>
> (2) is a member of an organization that he knows advocates the overthrow of our constitutional form of government;
>
> (3) *participates in a strike, or asserts the right to strike, against the Government of the United States* or the government of the District of Columbia; or
>
> (4) is a member of an organization of employees of the Government of the United States or of individuals employed by the government of the District of Columbia that he knows asserts the right to strike against the Government of the United States or the government of the District of Columbia. [Emphasis added.]

Conduct forbidden by 5 U.S.C. § 7311 is made criminal by 18 U.S.C. § 1918.

The position of the Department of Agriculture's Assistant General Counsel is as follows: First, that Cooperative Extension Agents hold "a position in the Government of the United States"; and second, that their participation in a strike of university employees would be a strike "against the Government of the United States." The Assistant General Counsel argues that the coverage of the no-strike statutes is very broad, and that they apply to "all forms of Federal employment." He acknowledges that Cooperative Extension Agents at the University of Hawaii are "university employees," but points out that at the same time they hold federal Schedule A appointments in the Extension Service, and also are covered by the federal Civil Service Retirement System.[1] Because Cooperative Extension Agents hold "a form of Federal employment," they are within the class covered by the no-strike statutes. In addition, he concludes that "[b]ecause the extension activities are simultaneously State and Federal activities, striking against these activities would be a simultaneous strike against the State and Federal governments." Therefore, Cooperative Extension employees who participate in a strike against the University of Hawaii are subject to "loss of their Federal appointment and criminal prosecution."

It is a well-established principle that where criminal penalties are involved, as they are here, the type of conduct proscribed by a statute must be narrowly construed. *United States* v. *Resnick,* 299 U.S. 207, 209 (1936); *United States* v. *Hartwell,* 73 U.S. (6 Wall) 385, 395 (1867). In *United States* v. *McNinch,* 356 U.S. 595 (1958), the question presented was whether a lending institution's application to the Federal Housing Administration for credit insurance was a "claim against the Government" within the meaning of the False Claims Act. In concluding that it was not, the Supreme Court stated:

> [I]t must be kept in mind . . . that in determining the meaning of the words "claim against the Government" we are actually construing the provisions of a criminal statute. Such provisions must be carefully restricted, not only to their literal terms but to the evident purpose of Congress in using those terms, particularly where they are broad and susceptible to numerous definitions.

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[1] Cooperative Extension Agents are appointed "to implement cooperative federal-state extension programs for agriculture and home economics under the Smith-Lever Act (7 U.S.C. §§ 341–349)." Authority for these appointments is found in 5 C.F.R. § 213.3113(a)(1), which authorizes Agriculture to grant appointments in the excepted service to persons employed in field positions, the work of which is financed jointly by Agriculture and "cooperating non-federal entities." We understand that Cooperative Extension Agents are generally already employed by the state when they receive their Schedule A appointments, and that they continue afterwards to be paid by the state and governed by rules and requirements applicable to state employees.

356 U.S. at 598 (citations omitted). *See also United States* v. *Katz,* 271 U.S. 354, 362 (1926) ("General terms descriptive of a class of persons made subject to a criminal statute may and should be limited where literal application of the statute would lead to extreme or absurd results, and where the legislative purpose . . . would be satisfied by a more limited interpretation"); *United States ex rel. Marcus* v. *Hess,* 317 U.S. 537, 542 (1943) ("we must give [a criminal statute] careful scrutiny lest those be brought within its reach who are not clearly included. . . .").

Even if Cooperative Extension Agents are considered federal employees for some purposes, we find nothing in the terms of the no-strike statutes or in their legislative history suggesting that Congress intended them to apply in situations where the object of a strike is a non-federal entity or activity being supported by federal funds. Section 7311 of Title 5 and § 1918 of Title 18 were enacted in 1955 (Pub. L. 330, 84th Cong., 1st Sess.), and consolidated several provisions in existing federal law relating to disloyalty and striking against the government. These existing no-strike provisions were found in § 612 of the Housing Act of 1949, § 305 of the Labor-Management Relations Act of 1947, and in successive appropriations riders beginning with the Third Urgent Deficiency Appropriations Act of 1946, 60 Stat. 269. *See* H.R. Rep. No. 1152, 84th Cong., 1st Sess. 2 (1955). The hearings in the House on the 1955 legislation show Congress' understanding of these laws as intended to protect the federal employer, and to prevent the disruption of federal governmental functions. For example, Congressman Bennett, who introduced the legislation in the House, told the Committee that they did not "prohibit a government employee with part-time private employment from striking against his private employer." *To Prohibit the Employment by the Government of Persons who are Disloyal: Hearings before the House Committee on Post Office and Civil Service,* 84th Cong., 1st Sess. 10 (1955). There is no indication of an intention to extend the statutory prohibition on striking to all public employees working on federally funded projects—as, for example, was accomplished explicitly with respect to certain political activity in § 12 of the 1948 Hatch Act. *See Oklahoma* v. *Civil Service Commission,* 330 U.S. 127 (1947).

When Cooperative Extension Agents strike against their university employer, they do so as employees of the University and not as employees of the federal government. While their participation in a strike may in some cases result in the disruption of a federal activity, we do not think Congress intended the federal no-strike statutes to reach so far.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

Constitutional Issues Raised by Inter-American Convention on International Commercial Arbitration

Proposed legislation giving Inter-American Commercial Arbitration Commission (IACAC) power to amend rules which have been enacted by Congress would result in an improper delegation of legislative power to a private organization, and any amended rule could not constitutionally be applied to agreements entered into after the effective date of the amendments.

Provision in proposed legislation allowing one House of Congress to disapprove amendments to IACAC rules, although not a veto of executive action, nonetheless violates the Presentment Clauses.

An alternative review mechanism whereby the Secretary of State would be required to approve or disapprove amendments to the IACAC rules would be constitutionally acceptable, since the amendments would not be binding on the government but merely advisory.

March 20, 1980

MEMORANDUM OPINION FOR THE ASSISTANT LEGAL ADVISER FOR PRIVATE INTERNATIONAL LAW, DEPARTMENT OF STATE

This responds to your request for the views of the Justice Department on the congressional review mechanism in the proposed implementing legislation for the Inter-American Convention on International Commercial Arbitration. You ask whether the review mechanism constitutes a "legislative veto." Our analysis of the review mechanism in the proposed legislation raises an additional question whether Congress may delegate its legislative power to the Inter-American Commercial Arbitration Commission (IACAC), a private organization. While the law is not clear in this area, we conclude that the delegation made in the proposed legislation presents serious constitutional problems. We believe, however, that the constitutional problems could be ameliorated if IACAC's amendments to its rules were applicable only to agreements entered into after the effective date of the amendments. The review mechanism in the proposed legislation, although not a veto of executive action, is a legislative veto and is, therefore, unconstitutional. At your request, we suggest an alternative review mechanism.

I.

The Inter-American Convention on International Commercial Arbitration provides that, when parties of signatory nations have agreed to submit to arbitration any dispute that may arise out of a commercial transaction, the arbitration shall be conducted in accordance with the rules of procedure of the IACAC unless the parties have expressly agreed otherwise. Articles 1 & 3. The proposed implementing legislation for the Convention defines the rules referred to in Article 3 of the Convention to be those rules as promulgated by the Commission on January 1, 1978. § 306(a). If the IACAC modifies or amends its rules, § 306(b) would require the Secretary of State to transmit to the House of Representatives and the Senate a document containing the rules as modified or amended together with a report setting forth the reasons for and the effect of such modifications or amendments. A majority of either the House or Senate may disapprove the rules as modified or amended within 90 days of the transmission. If the rules are not disapproved, the rules shall be published after 90 days have elapsed and shall become effective 120 days after publication. If the rules are disapproved, the Secretary is required to use his best efforts to reconvene the rulemaking body of IACAC to ensure that the rules applicable to the signatory parties to the Convention are uniform.

II.

The threshold question presented by the proposed implementing legislation is whether it involves an unconstitutional delegation of legislative power to a private organization. The legislation would incorporate by reference and thereby enact the rules of procedure of the IACAC in effect as of January 1, 1978. Since it is assumed that Congress would review and approve the rules in enacting the legislation, the incorporation of those rules by reference does not involve a delegation of legislative power to a private organization. *Cf. United States* v. *Sharpnack*, 355 U.S. 286, 293 (1958). *See also* Liebmann, G.W., *Delegation to Private Parties in American Constitutional Law,* 50 Ind. L.J. 650, 680 (1975). However, the proposed legislation implicitly gives the IACAC the power to amend those rules subject to one House's disapproval of such amendments. In effect, the legislature would delegate to a private organization the power to amend congressional legislation. We believe that such a delegation raises serious constitutional problems.

In analyzing the delegation question, we are hampered by the fact that "[t]he case law has not crystallized any consistent principles, either in the federal courts or in the state courts." Davis, Administrative Law Treatise § 2.14 at 138 (1958). Nevertheless, a survey of the relevant Supreme Court cases provides some guidance. In 1908, the Supreme Court rejected a claim that a statute permitting the American Railway

Association to set the uniform height for drawbars on freight cars constituted an invalid delegation, *St. Louis, Iron Mountain & Southern Railway Co.* v. *Taylor,* 210 U.S. 281 (1908). Three years earlier, it had upheld a delegation to miners to make regulations governing the recording of mining claims and the amount of work necessary to establish possession of a mining claim. *Butte City Water Co.* v. *Baker,* 196 U.S. 119 (1905).

However, more recently the Court found invalid a delegation to producers of two-thirds of coal to fix for producers selling coal to government contractors the minimum wages and maximum hours of their workers. *Carter* v. *Carter Coal Co.,* 298 U.S. 238, 310 (1936). Holding that the delegation violated the Due Process Clause of the Fifth Amendment, the Court stated:

> The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.

Id. at 311. In *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935), the Court, addressing the argument that a delegation to the President to approve codes of fair competition proposed by trade associations was proper because a delegation to the trade associations alone would be constitutional, stated:

> But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? . . . Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.

Id. at 537. The Court in *Schechter* distinguished *St. Louis, Iron Mountain & Southern Railway Co.,* as involving a matter of a technical nature and *Butte City Water Co.* as a recognition of local customs and of the rules of miners concerning mining claims. 295 U.S. at 537.

Adopting this distinction, it could be argued that the IACAC rules are not substantive regulations capable of imposing anti-competitive or unfair restrictions but are merely "technical" rules promulgated by a presumably disinterested body with a recognized expertise in arbitration procedure. *Cf.* Liebmann, *supra* at 680–719.

However, because the rules may affect substantive rights,[1] we are reluctant to conclude on the basis of this distinction that the delegation to the IACAC is clearly constitutional, especially in light of the scarcity and age of federal case law approving delegation to private bodies.[2]

Our concern about the effect such amendments might have on substantive rights would be significantly reduced if the amendments would apply only to agreements entered into after the effective date of the amendments. This approach would eliminate any potential for unfairness because a party entering an arbitration agreement would have the opportunity to examine the amendments to the IACAC rules and, if he regarded the amendments as unfair, could either decline to agree to arbitration or negotiate with the other party to the agreement the application of other rules or modifications to the amendments.[3] Whether you decide to apply the amended rules to all agreements in the interest of uniformity or only to agreements entered into after the effective date of amendments will determine whether governmental review is required. If the former approach is adopted, we believe that, in order to minimize the possibility of a challenge to amended IACAC rules, the rules should be subject to governmental review and adoption by legislation.

III.

The proposed legislative veto mechanism, although it does provide some governmental review of IACAC amendments, presents other constitutional problems. As you point out in your memorandum, this review mechanism is unlike the classic "legislative veto" provision

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[1] For instance, the rules govern the place of arbitration, the choice of law, the appointment of arbitrators, and the right to an oral hearing. It is conceivable that the rules could be amended in such a manner that American citizens could be disadvantaged in arbitration proceedings, *e.g.*, a country distant from the United States could be designated as the place of arbitration.

[2] Other problems could also be present here. First, a problem could arise out of the concept that, in a representative government, governmental powers should be vested in elected or disinterested *public* officials. In this manner, governmental decisions and processes are subject to the checks of a variety of legal controls such as the oath of office, the conflict of interest laws, the control over appropriations, the powers of appointment, confirmation, or removal, and ultimately the electoral process. Another problem arises from the nature of the power vested in the private body. It could be argued that rule-making power may be constitutionally vested only in "Officers of the United States" appointed pursuant to the Appointments Clause, Article II, § 2, clause 2. *See Buckley* v. *Valeo*, 424 U.S. 1, 113–41 (1976). Finally, if it is constitutional to delegate legislative power to private organizations, such a delegation should be subject to standards restricting the exercise of that power. *Cf. A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935). Although the courts' attitude toward delegation of legislative power to executive agencies without specific standards has relaxed considerably, *see generally* K.C. Davis, Administrative Law Treatise, §§ 2.05, 2.06 and 2.15 (1958), the lack of the checks mentioned above on a private organization's exercise of that power would suggest that standards imposed upon the exercise of legislative power by private organizations should be more stringent than the standards imposed on public bodies.

[3] Article 3 of the Inter-American Convention on International Commercial Arbitration applies the IACAC rules only when parties to an arbitration agreement have not expressly agreed otherwise.

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which purports to vest one House of Congress with the power to veto Executive action. Instead, the provision would allow one House of Congress to veto "private" action. Assuming, *arguendo*, that Congress could delegate to the IACAC the power to amend rules that had been enacted by Congress, the question is whether the Constitution authorizes a procedure whereby one House may control the exercise of discretion vested in the IACAC.

Article I, § 1 of the Constitution vests all legislative powers in a Congress, consisting of a Senate and House of Representatives. Furthermore, those powers cannot be exercised absent participation by the President. Article I, § 7, clause 2 requires "[e]very Bill . . . be presented to the President of the United States" for his approval or disapproval before it can become a law. Article I, § 7, clause 3 provides that "[e]very Order, Resolution, or Vote" to which concurrence of both Houses is necessary shall be presented to the President for his approval or veto.[4]

The Presentment Clauses thus provide two primary checks on the exercise of legislative power—the principle of bicameralism and the Executive veto. The veto provision in the proposed implementing legislation would not respect these constitutional checks. The proposed legislation would allow one House of Congress to disapprove amendments to the IACAC rules, but that legislative decision would not be presented to the President for his approval or veto. Nor would the President be given the opportunity to veto any "approval" of the amendments because the approval would be expressed by congressional inaction. Further, exercise by one House of the veto power would purport to place on the Secretary of State a legal duty to take steps to reconvene the rulemaking body of the IACAC. In our view, legal duties may not be imposed on the Executive by the exercise of something less than the full legislative process. Finally, if Congress could constitutionally delegate to the IACAC its legislative power to amend the rules, that power may be revoked only by affirmative legislative action by both Houses of Congress and the President, not by one House of Congress disapproving the exercise of that power.

IV.

If you decide that the IACAC rules amended should, as a matter of policy, apply to all arbitration agreements, you may wish to consider an alternative governmental review mechanism which would vest the Secretary of State with the power and duty to approve or disapprove amendments to the IACAC rules. This approach would cure the proposed legislation of both constitutional infirmities. IACAC's action in amending the rules would not be an exercise of legislative power because the amendments would not be binding on the government but would be merely advisory. The courts have held similar schemes not to be an unconstitutional delegation of legislative power. *Sun-Shine Anthracite Coal Co.* v. *Atkins*, 310 U.S. 381 (1940); *Todd & Co., Inc.* v. *SEC*, 557 F.2d 1008, 1012–13 (3d Cir. 1977); *R.H. Johnson & Co.* v. *SEC*, 198 F.2d 690, 695 (2d Cir. 1952).

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[4] Giving the President this integral role in the legislative process was believed necessary by the Framers in order to limit congressional power. As James Madison put it: "[I]t is against the enterprising ambition of this [legislative] department that the people ought to indulge all their jealousy and exhaust all their precautions." The Federalist No. 48, at 309 (New American Library Ed. 1961). Alexander Hamilton viewed the veto power of the President as necessary to prevent legislative and Executive powers from becoming blended in the same hands. *Id.*, No. 73, at 442. For more extensive discussion of the constitutionality of legislative vetoes, *see* 37 Op. Att'y Gen. 56 (1933); 41 Op. Att'y Gen. 230 (1955); 41 Op. Att'y Gen. 300 (1957).

A model for this approach may be found in the Maloney Act, 15 U.S.C. § 78o–3, authorizing Securities and Exchange Commission (SEC) registration of approved associations of securities dealers. Both the Second and Third Circuits have upheld the Maloney Act against a challenge that it unconstitutionally delegates legislative power to private parties. *Todd & Co., Inc.* v. *SEC*, 557 F.2d 1008, and *R.H. Johnson & Co.* v. *SEC*, 198 F.2d 690. Membership in a registered association, as a practical matter, is essential to doing business in over-the-counter securities.[5] The Maloney Act authorizes these associations to adopt substantive as well as procedural rules, to conduct disciplinary proceedings and to enforce sanctions, including expulsion. The associations are required to submit any changes in or additions to their rules to the SEC for review. 15 U.S.C. § 78o–3(j). The rules as amended become effective if within 20 days the SEC has not disapproved the amendments. The SEC is required to disapprove the amendments if they are not consistent with the Act.

The Maloney Act resembles the proposed implementing legislation in that amendments to the rules become effective unless disapproved. A critical difference, however, is that the Act *requires* the SEC to disapprove amendments if they are inconsistent with the Act. The Act, therefore, places an affirmative obligation on the SEC to consider amendments, determine whether they are inconsistent with the Act and disapprove them if they are.

The Secretary of State's review of IACAC's amendments, however, would have to be conducted in accordance with the rule-making requirements of the Administrative Procedure Act, 5 U.S.C. § 553,[6] unless the Secretary's review and adoption of IACAC rules could be considered a foreign affairs function so as to trigger the foreign affairs exemption, 5 U.S.C. § 553(a)(1), or unless an exception were otherwise provided. We understand that your Department interprets that exemption broadly. Bonfield, *Military and Foreign Affairs Function Rule-Making under the APA,* 71 Mich. L. Rev. 221, 258–62 (1972). We express no opinion on the applicability of this exemption. We would be happy, however, to consider your views on this question and advise you on the exemption's applicability.

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[5] An association may require its members to charge nonmember brokers the commissions charged to the general public rather than the lower commissions charged to members. 15 U.S.C. § 78o–3(e).

[6] See SEC regulations governing its review of amendments of registered association's rules. 17 C.F.R. 240.19b–4.

If you decide to apply the amended rules only to agreements entered into after the effective date of the amendments, the amendments, because they would be presumed to have been agreed to by the parties to an arbitration agreement, would not have to be approved by the Secretary of State. If you feel that the implementing legislation should, as a matter of policy, provide for some opportunity for governmental review of amendments, you may want to consider a "report and wait" provision. A model for this approach may be found in 28 U.S.C. § 2072 which delays the effective date of procedural rules promulgated by the Supreme Court until 90 days after the rules have been reported to Congress. Within that 90-day period, Congress may through the legislative process revoke all or some of the rules.

Larry L. Simms
Deputy Assistant Attorney General
Office of Legal Counsel

Constitutionality of Replacing Federal Tort Claims Act Liability with an Administrative Claims System

Congress may withdraw its waiver of sovereign immunity in the Federal Tort Claims Act for presently pending claims of radiation fallout victims, whether or not any administrative claims system is created as a substitute.

If it does not withdraw its waiver of sovereign immunity, Congress may substitute an administrative claims system for a judicial cause of action without offending due process, as long as the new remedy is fair and adequate when compared to the old one.

March 25, 1980

MEMORANDUM OPINION FOR THE DEPUTY ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

This responds to your request for our opinion on the constitutionality of a possible statute substituting an administrative claims system for Federal Tort Claims Act (FTCA) causes of action for illness allegedly due to the effects of fallout from the Atmospheric Nuclear Weapons Testing Program at the Nevada Test Site. Although the exact contours of such legislation are now a matter of speculation, you have asked us to make some basic assumptions about the likely nature of the program. We will assume that the statute would have retroactive effect in the sense that it would abrogate presently existing causes of action under the Federal Tort Claims Act, 28 U.S.C. § 2680. We will also assume that the statute would define eligibility for compensation sufficiently broadly to include persons with a range of prospects of recovery in civil litigation, that it would set a level of benefits that in a particular case might be substantially less than tort recovery for a prevailing plaintiff, and that ordinary procedures for administrative adjudication would be used. We conclude that it is possible for Congress to draft a statute having these attributes that will be constitutional.[1]

I. Congressional Withdrawal of Waivers of Sovereign Immunity

In the Federal Tort Claims Act of 1946, Congress waived the sovereign immunity of the United States for the torts of government employees, "under circumstances where the United States, if a private person, would be liable to a claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. § 1346(b); *See also* §§ 2674, 2680. Before that time, those with tort claims against the government were left to seek a remedy through a private bill in Congress (as were all claimants against the Government prior to the statute creating the Court of Claims, Act of Feb. 24, 1855, 10 Stat. 612). To what extent may Congress, having thus waived the sovereign immunity of the United States, reassert that immunity retroactively to defeat pending claims?

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[1] We do not consider here the validity of legislation abrogating any pending claims against government officers. Different considerations apply in that context, for example the constitutionality of removing the opportunity for a jury trial.

In *Lynch* v. *United States,* 292 U.S. 571 (1934), the Supreme Court provided a general exposition of congressional power to withdraw waivers of sovereign immunity. Beneficiaries of insurance policies issued under the War Risk Insurance Act sued for amounts due, alleging that repeal of the statutes governing their insurance deprived them of property without due process, in violation of the Fifth Amendment. It was clear to the Court that the insurance policies created vested property rights that could not be taken without just compensation. 292 U.S. at 579. Nevertheless, this did not mean that Congress was required to afford a judicial remedy:

> Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened. A different rule prevails in respect to contracts of sovereigns. Compare *Principality of Monaco* v. *Mississippi,* [292 U.S. 313 (1934)]. "The contracts between a Nation and an individual are only binding on the conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will" [quoting The Federalist No. 81 (Hamilton)]. The rule that the United States may not be sued without its consent is all embracing.
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> Although consent to sue was thus given when the policy issued, Congress retained power to withdraw the consent at any time. For consent to sue the United States is a privilege accorded; not the grant of a property right protected by the Fifth Amendment. The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration. *DeGroot* v. *United States,* 5 Wall. 419, 432. . . . The sovereign's immunity from suit exists whatever the character of the proceeding or the source of the right sought to be enforced. It applies alike to causes of action arising under acts of Congress, *DeGroot* v. *United States,* 5 Wall. 419, 431; *United States* v. *Babcock,* 250 U.S. 328, 331; and to those arising from

> some violation of rights conferred upon the citizen by the Constitution. *Schillinger* v. *United States,* 155 U.S. 163, 166, 168. The character of the cause of action—the fact that it is in contract as distinguished from tort—may be important in determining (as under the Tucker Act) whether consent to sue was given. Otherwise, it is of no significance. For immunity from suit is an attribute of sovereignty which may not be bartered away.
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> Mere withdrawal of consent to sue on policies for yearly renewable term insurance would not imply repudiation. When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. *United States* v. *Babcock,* 250 U.S. 328, 331. It may limit the individual to administrative remedies. *Tutun* v. *United States,* 270 U.S. 568, 576. And withdrawal of all remedy, administrative as well as legal, would not necessarily imply repudiation. So long as the contractual obligation is recognized, Congress may direct its fulfilment without the interposition of either a court or an administrative tribunal.

Id. at 580–82 (footnotes omitted). The Court went on to determine that Congress' repeal of the insurance statutes did not "intend to preserve the right and merely withdraw consent to sue the United States." *Id.* at 583 (footnote omitted). Accordingly, the Court held that the repeal of the insurance statutes was unconstitutional.

It is clear that in *Lynch* the Court thought that, had Congress merely abrogated the claimants' remedy by withdrawing consent to sue, the effect would have been to remit them to private bills for redress of the taking of their property. To the same effect is *Perry* v. *United States,* 294 U.S. 330, 331 (1935), in which the Court held that the Government could not rescind obligations for payment of its bonds in gold, because the power of Congress "to borrow Money on the credit of the United States" (Article 1, § 8) creates the power to enter binding obligations. The Court remarked, however:

> The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and, despite infirmities of procedure, remains binding upon the conscience of the sovereign. *Lynch* v. *United States, supra,* pp. 580, 582.

294 U.S. at 354.

A more recent reaffirmation of *Lynch* is found in *Maricopa County* v. *Valley National Bank,* 318 U.S. 357, 362 (1943). The Court held that Congress, having granted states the right to tax a federal instrumentality, could retroactively withdraw that consent despite the fact that states had acquired liens in the interim. It brushed aside claims that a Fifth Amendment violation had occurred with the observation that the states could only enforce any rights they had acquired through a suit against the United States, and "[n]o such suit may be maintained without the consent of the United States. Such consent, though previously granted, has now been withdrawn. And the power to withdraw the privilege of suing the United States or its instrumentalities knows no limitations." *Lynch* v. *United States,* 292 U.S. 571, 581–582, and cases cited.

As *Maricopa County* recognized, *Lynch* has been decided against a background of earlier cases in much the same vein. Illustrative is *District of Columbia* v. *Eslin,* 183 U.S. 62 (1901). Congress had enacted a statute granting jurisdiction to the Court of Claims over certain claims involving public works in the District of Columbia. Suits under this act were pursued to judgment, but before the judgments were paid Congress repealed the statute, explicitly providing that "proceedings pending shall be vacated, and no judgment heretofore rendered in pursuance of such act shall be paid." 183 U.S. at 64, citing 29 Stat. 665, 669. The Court, asked to review the judgments of the Court of Claims, dismissed the appeal for want of jurisdiction, on grounds that a Supreme Court declaration of the rights of the parties would now be advisory. The Court stated:

> It was an act of grace upon the part of the United States to provide for the payment by the Secretary of the Treasury of the amount of any final judgment rendered under that act. And when Congress by the act of 1897 directed the Secretary not to pay any judgment based on the act of 1895, that officer could not be compelled by the process of any court to make such payment in violation of the act of 1897. A proceeding against the Secretary having that object in view would, in legal effect, be a suit against the United States; and such a suit could not be entertained by any judicial tribunal without the consent of the Government.

183 U.S. at 65.

If this line of Supreme Court cases is still good law, Congress should be able to withdraw the FTCA's waiver of sovereign immunity for pending claims of fallout victims, whether or not any administrative claims system is created as a substitute. In view of the early practice of leaving all claimants against the Government to seek relief from Congress, followed for over a half-century of this nation's existence, it is hard to dispute the Court's conclusion that there is no constitutional right to a judicial remedy. Indeed, FTCA claims would seem to be *a fortiori* from *Lynch* and *Perry,* since tort claims do not involve vested rights protected against substantive interference by Congress, as did that contract rights considered in those two cases. Thus, Congress could simply amend the FTCA to add another exception to 28 U.S.C. § 2680, for present and future claims arising from the activities of the United States in conducting nuclear weapons tests at the Nevada Test Site. For a number of reasons, however, we think it may be imprudent to rest exclusively on the *Lynch* line of cases. First, the extensive dicta in *Lynch* itself occurred in a case in which the Court was *overturning* a congressional attempt to repeal the insurance statutes in question, as a violation of the just compensation requirement of the Fifth Amendment. Second, neither in *Lynch* itself nor in any later case has the Court actually countenanced so harsh an action as the retroactive withdrawal of an individual's tort cause of action with little or no substitute remedy.

Moreover, in recent years the Supreme Court has substantially expanded its definition of interests falling within the "property" that is protected by the due process clause, including statutory entitlements to many kinds of governmental benefits. *See, e.g., Goldberg* v. *Kelly,* 397 U.S. 254, 262 and n.8 (1970). This development may undermine *Lynch's* characterization of a cause of action against the Government as a "privilege." *See de Rodulfa* v. *United States,* 461 F.2d 1240, 1258 (D.C. Cir.), *cert. denied,* 409 U.S. 949 (1972). It can be argued that causes of action resemble other government benefits in that even if there is no initial right to have them, once they are conferred they may not be withdrawn arbitrarily.

Still, it must be recognized that the Court has yet to hold or even suggest that withdrawal of a waiver of sovereign immunity is subject to due process constraints. The issue of the effect of *Goldberg* and its progeny on *Lynch* is an open one—accordingly, we cannot exclude the possibility that abrogation of pending causes of action might receive *some* scrutiny by the courts, as does other retroactive governmental action.

In addition, a leading sovereign immunity case has recognized a "constitutional exception to the doctrine of sovereign immunity" that allows the maintenance of a suit to contest an alleged taking of real property by the Government without just compensation. *Larson* v. *Domestic & Foreign Commerce Corp.,* 337 U.S. 682, 696 (1949), citing *United States* v. *Lee,* 106 U.S. 196 (1882). This "exception" is inconsistent with *Lynch's* dictum that there is no right to a judicial remedy even for claims of constitutional origin. Thus, if any of the fallout claimants can successfully characterize their injuries as takings, it might be possible for them to escape the bar of the *Lynch* line of cases.

Finally, it may be that in substituting a fallout claims system for existing causes of action, Congress will be unwilling explicitly to reassert the bar of sovereign immunity. In recent years, Congress has generally expanded, not contracted its waivers of sovereign immunity. *See, e.g.*, Pub. L. No. 93-253, 88 Stat. 50, amending the FTCA to allow recovery for torts of law enforcement officers, 28 U.S.C. § 2680(h). And a reassertion of immunity against the fallout plaintiffs, even with a substitute claims system, could have an appearance of harshness that Congress would avoid if possible. If Congress were simply to create a claims system and to provide for its exclusiveness as a remedy without adding a new exception to the FTCA, the courts might conclude that Congress had merely altered the remedy against the United States, without reasserting sovereign immunity. The likelihood of such a result is suggested by the *Lynch* Court's unwillingness to treat an ambiguous statute as a reassertion of soverign immunity. The consequence would be to subject the statute to due process review, a prospect to which we now turn.

II. Due Process and Legislative Alteration of Causes of Action

Shortly after *Lynch* was decided, the Supreme Court avoided reaching due process objections to a statute retroactively substituting an administrative claims system for a cause of action, by determining the new remedy to be "fair and adequate." In *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337 (1937), the plaintiff filed a lawsuit against the Collector of Internal Revenue to obtain a refund of an allegedly illegal tax. Congress then substituted an exclusive administrative remedy, which was apparently designed to afford the same measure of recovery as the abrogated cause of action. 301 U.S. at 345, 351. The Government argued that no decision on Congress' power to withdraw suit against the Collector and the Government was necessary since the new remedy was "fair and adequate." [2] The Supreme Court agreed and inquired into the sufficiency of the statute's provisions for administrative adjudicative procedures and judicial review. It found them adequate to determine pertinent questions of fact and law. 301 U.S. at 341-43. Thus *Anniston* does not provide support for the validity of legislative substitution of limited administrative benefits for the full measure of tort compensation. It does suggest that a claims system should employ well-established techniques for administrative adjudication and subsequent judicial review, such as those in the Administrative Procedure Act, 5 U.S.C. §§ 556–557, 701–706.

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[2] Two reasons may account for the Court's apparent perception of a need to avoid constitutional issues in *Anniston*. The first is the "constitutional exception to sovereign immunity" in taking cases, discussed in text above. The second is that the statute abrogated suits against both the Government and the officer involved.

More recently, in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), the Court upheld against a due process challenge the Price-Anderson Act, 42 U.S.C. § 2210, which limits the liability of the nuclear power plant operators for the consequences of accidents. The Court viewed the liability limitation as an ordinary legislative balancing of economic interests, and accorded it standard rationality review, which it passed readily. Of particular interest here is the Court's response to the plaintiff's argument that the liability limitation offended due process by failing to provide those injured by a nuclear accident with a satisfactory *quid pro quo* for the common law rights of recovery which the Act restricted. The Court concluded that the Act provided a "reasonably just substitute" for the tort law remedies it replaced. 438 U.S. at 93. In support of the fairness of the arrangement, the Court cited the assurance of a $560 million fund for recovery, in place of the uncertain resources of private defendants, and the Act's requirement that utilities waive state tort law defenses, which eliminated requirements for proof of fault and accompanying delay and uncertainty in litigation. The Court seemed to think that the Act placed prospective plaintiffs in at least as favorable a position as they would have occupied under the common law. Thus *Duke Power*, like *Anniston*, provides little support for the validity of a system that materially disadvantages claimants. The Court concluded:

> In the course of adjudicating a similar challenge to the Workmen's Compensation Act in *New York Central R. Co.* v. *White*, 243 U.S. at 201, the Court observed that the Due Process Clause of the Fourteenth Amendment was not violated simply because an injured party would not be able to recover as much under the Act as before its enactment. "[H]e is entitled to moderate compensation in all cases of injury, and has a certain and speedy remedy without the difficulty and expense of establishing negligence or proving the amount of the damages." The logic of *New York Central* would seem to apply with renewed force in the context of this challenge to the Price-Anderson Act. The Price-Anderson Act not only provides a reasonable, prompt, and equitable mechanism for compensating victims of a catastrophic nuclear incident, it also guarantees a level of net compensation generally exceeding that recoverable in private litigation. . . . This panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by the Price-Anderson Act. Nothing more is required by the Due Process Clause.

438 U.S. at 92–93.

In *Duke Power*, the Court was dealing with prospective legislation—no claims for a nuclear accident were then outstanding. The legislation upheld in *New York Central* appears to have been prospective also. The Court's approach to the validity of retroactive legislation under the Due Process Clauses of the Fifth and Fourteenth Amendments is, however, not greatly different from that of *Duke Power*, even though substantial new burdens may be imposed. The ordinary standard is that due process "generally does not prohibit retrospective civil legislation, unless the consequences are particularly 'harsh and oppressive'," *United States Trust Co. of New York* v. *New Jersey*, 431 U.S. 1, 17 n.13 (1977), citing *Welsh* v. *Henry*, 305 U.S. 134, 147 (1938) and *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14–20 (1976). In *Usery*, the Court upheld the Black Lung Benefits Act, although it required mine operators to pay workman's compensation benefits to miners on a retroactive basis. The Court said:

> But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations. . . . This is true even though the effect of the legislation is to impose a new duty or liability based on past acts.

428 U.S. at 16.

In *Usery*, the Court thought that retroactive imposition of an obligation to pay compensation was a rational application of the enterprise liability principles of modern tort analysis, according to which a business may be required to absorb the cost of the injuries it causes, regardless of the presence of fault in the traditional sense. The Court remarked that whether a broader or narrower cost-spreading scheme would be better did not rise to the level of a constitutional issue. 428 U.S. at 19.

Usery does not necessarily represent the high-water mark of judicial willingness to allow retroactive legislative alteration of compensation rights against private parties. The courts of appeals have upheld legislative abrogation of existing causes of action with no countervailing benefit—at least where the causes of action were themselves in the nature of windfalls, due to surprising judicial interpretation of earlier statutory provisions.[3] Both *Usery* and these court of appeals decisions seem to rest on notions of fairness—it would be unsound to extend them to the arbitrary alteration of compensation rights.

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[3] *Battaglia* v. *General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948) (Portal-to-Portal Act); *Seese* v. *Bethlehem Steel Co.*, 168 F.2d 58 (4th Cir. 1948) (Portal-to-Portal Act). *De Rodulfa* v. *United States*, 461 F.2d 1240, 1250 (D.C. Cir.), *cert. denied*, 409 U.S. 949 (1972), cites cases for the general rule that a change in governing law may be retroactively applied to pending litigation. *E.g.*, *United States* v. *Schooner Peggy*, 5 U.S. 103 (1 Cranch) (1801) (Marshall, J.). Indeed, such a change may even affect rights incident to final judgments. *See Fleming* v. *Rhodes*, 331 U.S. 100 (1947), upholding requirements for administrative approval of suits to enforce judgments granting possession to property.

III. The Government's Adjustment of Its Own Liabilities—Analogies from the Contract Clause

What standard of review should apply to a government's adjustment of its own preexisting obligations? In *Usery* and *Duke Power,* the Court applied rationality scrutiny to federal statutes adjusting rights and burdens among private parties. (In *Duke Power,* although federal indemnity was a large part of the liability pool provided by the Price-Anderson Act, the Government was not reducing its own prior liability.) In litigation under the Contract Clause (art. I, § 10), which only applies to the states, the Court has suggested that a more stringent standard applies to a government's attempt to modify its own obligations. In *United States Trust Co. of New York* v. *New Jersey, supra,* the Court invalidated an attempt by New Jersey to modify a contract with some of its bondholders. The state had eliminated an important security provision for the bondholders, without granting them a countervailing compensation. The Court remarked:

> The Contract Clause is not an absolute bar to subsequent modification of a State's own financial obligations. As with laws impairing the obligations of private contracts, an impairment may be constitutional if it is reasonable and necessary to serve an important public purpose. In applying this standard, however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake.

431 U.S. at 25–26 (footnote omitted).

In general, federal cases under the Due Process Clause closely parallel the Contract Clause cases. This suggests that if the Court abandons the view of sovereign immunity it articulated in *Lynch,* it is likely to employ the higher level of scrutiny articulated in *United States Trust Co.* when it reviews the Government's adjustment of its own obligations—especially when the Government disadvantages private parties retroactively with no compensating benefits. That does not mean that such heightened scrutiny will necessarily apply in the case at hand. Since there is presently genuine uncertainty regarding the ultimate cost to the Government of pending FTCA litigation, it is not clear that the substitution of a claims system will be seen principally as an "economy" measure.

It should be possible to draft a valid statute creating an exclusive administrative claims system, even if the test of *United States Trust Co.* is applied. In that case, the Court identified alternative means to the state's end, and emphasized the direct invasion of reliance that typically attends a Contract Clause case. The latter is not present here; as for the former, if the Government's purpose is to provide a broader allocation of benefits than the FTCA would produce, the only alternative would be to establish a nonexclusive administrative claims system, leaving plaintiffs the option to pursue FTCA litigation. Although arguments for governmental economizing were discounted by the *United States Trust Co.* Court, that was probably because the state gave the bondholders no countervailing benefit. That need not be true here; the need to conserve limited public resources by making the administrative claims system exclusive should be given enough weight to uphold the statute, if it accords claimants sufficient advantages to ensure the fairness of the overall result.

IV. Application of Due Process Analysis to an Administrative Claims System for Fallout Victims

Assuming that due process applies in the case before us, the question therefore seems to be whether an administrative claims system can provide a "reasonably just substitute" (*Duke Power*) for existing causes of action, or a "reasonable and necessary" means to "an important public purpose" (*United States Trust Co.*). For a statute to satisfy even the more stringent of these tests, it should only be necessary that it grant claimants substantial advantages as a *quid pro quo* for their causes of action. A number of substantial hurdles presently stand in the way of recovery by private plaintiffs under the Federal Tort Claims Act. First, it is not clear that plaintiffs will be able to establish the Government's liability. The "discretionary function" exception of 28 U.S.C. § 2680(a) will preclude liability for all planning decisions involved in the tests, as opposed to operational ones. *Dalehite* v. *United States,* 346 U.S. 15 (1953). It has been held, however, that negligent failure to warn those in the path of fallout is actionable. *Bulloch* v. *United States,* 133 F. Supp. 885, 888 (D. Utah, 1955); *but see Bartholomae Corp.* v. *United States,* 135 F. Supp. 651 (S.D. Cal., 1955) (no liability for damage from atomic blast; duty to warn not discussed). Second, many plaintiffs may be unable to prove that fallout caused their illness. Estimating the dosage received by a particular individual and linking that to the etiology of a particular cancer is, under all current assessments, often very difficult. Third, some claims may be barred by the statute of limitations, 28 U.S.C § 2401(b). (It has been held that the two-year period runs from the time a radiogenic illness is discovered or should have been discovered, and not from the date of exposure. *Kuhne* v. *United States,* 267 F. Supp. 649 (E.D. Tenn., 1967).) In any event, the litigation involved is sure to be time-consuming, considering the technical complexity of much of the proof. Still, it can be argued that ultimate recovery to the successful plaintiff in a tort action would be in a much higher amount than under an administrative claims system, perhaps impelling the Government to enter favorable settlements of some claims.

The particular structure of a claims system can help to ensure its constitutional validity. First, eligibility criteria for filing claims can reflect probabilities of both serious initial exposure levels to fallout and the correlation of particular cancers with exposure to radiation. To the extent that these criteria would allow compensation to some persons whose showing of causation would not likely satisfy a trier of fact in litigation, the Government will confer an advantage on claimants as a class. Moreover, the program would be responding as precisely as possible to increased risks that we know the affected population has encountered, although we cannot be sure exactly which persons suffered the greatest exposure or exactly which cancers are the result of that exposure. Thus there is evident fairness in a set of eligibility criteria based on probabilities.

With regard to amounts of compensation, the larger the pool of claimants the less feasible it becomes to approach full tort compensation. But insofar as compensation would duplicate that recovery, by providing for medical expenses and perhaps some income support, claimants are not disadvantaged. If recovery for pain and suffering is the major element of tort recovery to be eliminated, the statute will resemble other government compensation programs in that respect. It is easier to justify a claims program that is on an entitlement basis, rather than one payable from a limited fund.[4]

The administrative procedures used to adjudicate claims are particularly important, because they can eliminate procedural features of litigation that would proably defeat private claims, such as the pertinent tort burdens of proof.[5] As we commented above, the Administrative Procedures Act provides a general structure for both adjudicative procedure and judicial review.

V. Conclusion

From the foregoing, two central conclusions emerge. First, if the primary goal of this proposed legislation is to minimize the risk of successful constitutional challenge, the preferable course will be for this bill plainly to indicate that it is Congress' intent to rescind its waiver of sovereign immunity for this class of cases. *Lynch* suggests that this course presents no constitutional question—at least in terms of the judicial reviewability of the action—and despite considerable development in the analogous areas of the law discussed above, we know of no direct precedent that would call into question the broad language of that Supreme Court case. Second, even if the bill is reviewed under due process rationales discussed above, there is good reason to conclude that it will comfortably survive attack so long as the eligibility criteria are reasonably flexible, the amount of compensation reasonably generous, and the administrative process consistent with ordinary procedure for adjudicating claims. We would be pleased to review further any particular proposal.

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[4] If a limited fund is established, part can be reserved for illness that is still latent. This is a feature of the Price-Anderson Act, 42 U.S.C. § 2210(o).

[5] Administrative procedures often use flexible techniques not available to courts to achieve such results. *E.g.*, in *Usery*, the Act provided for rebuttable presumptions favoring claimants, for example that deaths occurring in prior years had been due to black lung disease in stated circumstances.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

Representation of Government Employees in Cases Where Their Interests Diverge from Those of the United States

The Attorney General is authorized to represent the personal interests of government employees sued in their official capacities if it will serve the interests of the United States.

Even if adequate representation of an employee's personal interests in a lawsuit requires the making of an argument that conflicts with a governmental position, such representation may still serve the interests of the United States.

Where the personal interests of employee-defendants conflict with the interests of the United States, as would be the case if they were to advance an argument that would support a claim against the United States, it would be inappropriate for the Attorney General either to represent them directly or to finance their representation by private counsel.

If the personal interests of employee-defendants potentially conflict with the interests of the United States, the Attorney General may still represent them, if they wish him to do so, without implicating the ethical rule against representing differing interests of multiple clients.

March 27, 1980

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

You have requested our views on two representation questions that arose on appeal in a civil case in the Seventh Circuit, *Hampton, et al.* v. *Hanrahan, et al.*, No. 77-1698.* We gave you oral advice with respect to both questions. This memorandum sets out our thinking in greater detail.

At the trial, the Department of Justice (DOJ) represented three federal defendants, all of them agents or former agents of the Federal Bureau of Investigation (FBI) who are accused of having assisted the State of Illinois in a lethal and allegedly unlawful "raid" against Black Panthers in Chicago in 1969. DOJ defended the case on the merits, won a directed verdict at the close of the plaintiffs' evidence, and suffered a reversal on appeal when the Seventh Circuit remanded the case for a new trial. The Seventh Circuit held that the plaintiffs' evidence was sufficient to go to the jury.

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*NOTE: The court of appeals decision in *Hampton* v. *Hanrahan* is reported at 600 F.2d 600 (7th Cir. 1979). Ed.

If the Seventh Circuit had simply remanded the case, no representation problem would have arisen. The Civil Division believes that the case is clearly one in which it is necessary and proper under our Representation Guidelines [1] for the government to provide a defense on the merits. In connection with the remand, however, the Seventh Circuit entered an order making an impressive award to the plaintiffs (in the amount of $90,000 plus) for attorney fees incurred by them in connection with the appeal; and in its order the court seemed to say that the award would be collected, not from the defendants personally, but from the State of Illinois and the United States (the United States paying one-third of the total). We note in passing that the United States is not a party to this action, although the federal defendants have apparently been sued in their "official" as well as their "personal" capacities.

The representation problem arises because (1) this Department has traditionally taken the position that the United States cannot be required to pay attorney fees under the statute upon which the Seventh Circuit relied, 42 U.S.C. § 1988, and (2) the defendants may perceive that it is in their interest to support the contrary view. In other words, to reduce their own liability or potential liability, they may wish to argue that the fee award may be collected from the United States.

Because of the possibility of a conflict between the government's position and the position the defendants may wish to take with regard to the fee award issue, the Civil Division has advised the defendants that it may be necessary to make some alteration in the representation arrangement. In particular, the Civil Division has said: (1) that to vindicate the government's interest, the United States will request the Seventh Circuit to clarify its order; (2) that the United States will pursue appropriate remedies in the Supreme Court if the Seventh Circuit refuses to abandon the position it seems to have taken with regard to the liability of the United States; (3) that the Department will represent the defendants with regard to all aspects of the case (arguing both that the directed verdict should have been allowed to stand and that fees were not properly awarded either against the defendants or against the United States) if the defendants will agree to representation on these terms, and will agree as well that the DOJ attorneys will be free to support the view that the fee award cannot in any event be taxed against the United States; (4) that the defendants should consult private counsel for advice as to how to proceed; and (5) that if they wish to pursue an argument contrary to the government's position on the fee award issue, they must retain private counsel for that purpose.

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[1] *See* 28 C.F.R. § 50.15. A revised version of these guidelines exists but has not yet been printed in C.F.R. All references to the "Representation Guidelines" in this memorandum are references to the revised version. [NOTE: The revised Representation Guidelines were published in the Code of Federal Regulations in substantially unchanged form in 1982. Ed.]

The Civil Division has advised the defendants that the Department cannot pay for legal services rendered by private counsel on their behalf in advancing arguments either in the Seventh Circuit or in the Supreme Court inconsistent with the government's view that § 1988 does not authorize awards against the United States.[2]

In the midst of this entangled state of affairs, you have requested our opinion on the following questions: First, is the Civil Division correct in its view that this Department has no authority to retain private counsel to argue in court on the defendants' behalf that § 1988 authorizes fee awards against the United States? Second, assuming the defendants do not wish to pursue such an argument, would it be ethical for the Department to continue to represent them under the terms described in (3) above?

I.

In a series of recent opinions this Office has wrestled with the general question of the Attorney General's authority to represent government employees in civil cases. Those opinions turn upon a number of considerations, but they proceed from one basic proposition: The general statutes that define the Attorney General's litigation function (28 U.S.C. § 515 *et seq.*) authorize him to defend government employees against claims arising against them for conduct in the course of their employment, even in cases in which the relief sought by the claimant will not bind the Treasury of the United States or direct the officers of the United States in the performance of their duties. In other words, these general statutes authorize the Attorney General to defend the government employees against claims affecting their *personal* interests—i.e., claims against their property or against their liberty or reputations (e.g., state criminal prosecutions).

The rationale for this interpretation of the Attorney General's function is straightforward: If an employee is sued personally for something he did or omitted to do in the course of his employment, the United States may well have an interest in establishing that his conduct was lawful and in relieving him of the expense of retaining an attorney, provided the act or omission of which he is accused was a normal and necessary part of his job. In other words, the interests of the government and the personal interests of the employee may coincide. Accordingly, since the relevant statutes provide that the Attorney General may conduct any litigation in which the United States is "interested," the Attorney General is authorized by statute to appear in proper cases to represent the personal interests of officers and employees who are sued in their personal capacities. Where private and public interests coincide, the representation of private interests is tantamount to representation of the interests of the United States.

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[2] The defendants may of course decide not to argue that the award may be collected from the United States. The legal support for such an argument is not ironclad, and in any case the defendants may conclude that they stand a better chance of defeating the award if they can show that it cannot be collected from a deep pocket, the Treasury of the United States. We cannot of course anticipate what the defendants may do or what advice they may receive from private counsel.

We note in passing that in some special circumstances the Civil Division, before making a final representation decision, finds it necessary to retain and pay private counsel to consult with the employee in question to determine whether or not there is in fact or law a conflict of interest that would preclude representation by this Department. This practice is reasonably incident to the Attorney General's basic litigation function, since to represent personal interests he must first determine whether they coincide with or diverge from the interests of the United States. It may be appropriate to follow this practice in the present case with regard to consultation by the defendants with private lawyers over the question of how they should proceed.

This conception of the Attorney General's function, which we reaffirm, is reflected in the Representation Guidelines. The Guidelines provide that, when a government officer or employee is sued personally for something he did or omitted to do in the course of his employment, the Attorney General will defend him, if it can be determined that a defense of his personal interests will serve the interests of the United States.

In the typical case, the Attorney General represents government employees through attorneys and assistants regularly employed in the Department or in the U.S. Attorneys' Offices; but with increasing frequency in recent years the Attorney General has retained private lawyers to represent government employees. Why has this happened? The basic principles of personal representation are sound in theory, but they are not easy to follow in practice. Cases arise in which: (1) a decision regarding representation must be made *before* it is known whether the interests of the government coincide with the personal interests of the defendant; (2) conflicts among multiple *personal* interests make it awkward for this Department to represent them all; (3) an identity of interest between the government and an individual which is present at the outset of a case evaporates in the course of litigation; or (4) a community of interest regarding core issues is disrupted by a divergence of interest regarding some peripheral point. As we understand it, the practice of retaining private lawyers to defend government employees arose as the Department attempted to deal justly and efficiently with these problem cases. The Guidelines provide that private counsel may be provided in lieu of government counsel in certain special cases in which representation by government counsel would be awkward. We need not discuss the phenomenon in its entirety. Instead, for purposes of analysis, we will show why in some circumstances it does make sense for the Attorney General to discharge his representation function through private lawyers, and we will then consider the present case in its relation to the Revised Guidelines.

It is sometimes awkward from an institutional or professional standpoint for DOJ lawyers to provide personal representation for government employees, even though it is clear that representation of their interests will be in the interest of the United States. The best example of that sort of case is the one involving multiple federal defendants who have differing views regarding the relevant facts. It may well be that *none* of these views differs in a material way from the view (if any) that the "United States" would have on the subject if the United States were a party to the case; and the ultimate outcome sought by each of the defendants may be perfectly consistent with the interests of the United States. Nonetheless, because of the differences regarding the facts, it might be professionally awkward for one DOJ lawyer or any one group of DOJ lawyers to represent all of the defendants; in such cases this Office has taken the view that the Attorney General has "implied authority" to provide representation through a mechanism that will enable him to resolve the professional difficulty. In particular, using his general authority to contract for services necessary in the performance of his statutory functions, he can hire private lawyers to do indirectly what it would be awkward for DOJ lawyers to do directly.

A far more troubling class of cases in which private representation is sometimes provided are those in which it is clear that the personal interests of the employee-defendant actually diverge from the interests of the United States with regard to some material issue of fact or law involved in the litigation. This is the class of cases most directly relevant to your inquiry, and to that class we now turn.

Section 50.15(a)(10) of the Revised Guidelines contemplates that cases will arise in which "adequate" representation of the personal interests of a government employee may require "the making of an argument which conflicts with a governmental position."* The Guidelines provide that, in such a case, the conflict between "the governmental position" and the "argument" to be made on the employee's behalf need not prevent the Department from providing the employee with representation. It may yet be possible to determine that representation of the employee will serve the interests of the United States; and if that is the case, the Guidelines provide that the Department can do one of two things: (1) it can tender representation through a DOJ lawyer (if the employee, after being advised of the government's conflicting position with regard to the "argument," consents to representation on the government's terms), or (2) it can provide representation through a private lawyer, who will represent the employee at government expense and make the argument that the government lawyer cannot make.

The problem lies with the second option. How can it be in the interest of the United States (and therefore within the province of the Attorney General under § 515 *et seq.*) to finance an argument in court that is inconsistent with the position that the United States itself has taken or would take with respect to the matter in issue? For purposes of this memorandum, we will not attempt to answer that question in general terms. We are aware that in difficult and appealing circumstances, § 50.15(a)(10) has been invoked to provide government employees with private lawyers who have made arguments inconsistent with positions taken by the United States. But our most recent opinion on this subject suggests that it is not within the province of this Department to provide employees with representation directly or indirectly for the purpose of opposing the government itself in federal criminal proceedings, and we reasoned in that memorandum that providing a personal defense for an employee in a civil case is justified only to the extent that the defense is tantamount to a defense of the government itself. The Attorney General represents government employees, directly or indirectly, only to the extent that their interests coincide with the interests of the United States.

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*Note: As published in the Code of Federal Regulations in 1982, the Representation Guidelines refer to "the assertion of a position that conflicts with the interests of the United States . . . ." See 28 C.F.R. § 50.15(a)(10) (1982). Ed.

However the issue may be resolved in other contexts, the present case presents the issue in a most extreme setting. This case may well be distinguishable in a qualitative sense from a great many of the other cases in which the question can arise. Here we are being asked to decide not merely if this Department may finance a collateral argument that would differ in some respect from an argument the "United States" would make in pursuit of the same result or in defense of the same claim. Rather, we are being asked to decide that the Department may finance an argument that would be made in support of *a claim against the United States*. That is what the Department would be doing if it provided private representation on the fee award issue. We would be paying a lawyer to argue either that the plaintiffs' claim for fees under § 1988 is good against the United States, or that the defendants themselves have a legal claim against the United States for indemnity or contribution for fees taxed against them. It is purely a question of sovereign immunity: as between the defendants and the United States, who pays?

There may indeed be circumstances in which Congress could conclude that it would serve the larger interests of the United States to finance legal claims against the United States. Congress could, for example, establish a legal aid society for government employees for the purpose among others of supporting a legal assault on the doctrine of sovereign immunity. But if it would be possible to make a legislative choice in favor of these claimants, it would nonetheless be very difficult, in our view, to conclude that that sort of choice is within the scope of the Attorney General's implied authority under the statutes that define his office. His function, as we read those statutes, is to use the resources of this Department to oppose legal claims against the United States where, as here, he believes them to be without legal merit. It is not his function to support such claims. For that reason we think it would be inappropriate to construe the Revised Guidelines as authorizing the Civil Division to pay private lawyers to represent government employees in connection with the support or assertion of claims such as the claim involved here. We think it would be inappropriate for the Attorney General to provide the federal defendants with private representation for the purpose of attacking the United States on the fee award issue.

We have three additional observations to make before moving to your second question. First, our analysis has turned thus far on an interpretation of the statutes that define the Attorney General's litigating function, 28 U.S.C. § 515 *et seq.* This analysis is appropriate in our view, since our task is to construe the Representation Guidelines, and those Guidelines are designed to define the Attorney General's litigating function in civil cases involving government employees.

Second, it makes no difference for purposes of this analysis that the defendants in the present case are employees or former employees of the Department of Justice. Absent a specific statute that alters the usual arrangement, the Attorney General's authority to represent the personal interests of government employees in civil litigation (directly or indirectly) does not vary under § 515 *et seq.* from agency to agency, and the limitations on his authority are the same in each case. Under § 515 *et seq.,* the Attorney General's authority to provide representation for DOJ employees who are sued personally in a civil case is no different from his authority to provide representation for the employees of, say, the Department of State.

Finally, we are mindful that the Attorney General is not simply a litigator. He has important functions other than those prescribed in § 515 *et seq.* He is the head of a large executive department; and like any department head he has general authority, subject to appropriations, to make contracts and pay expenses that must be made and paid if his department is to run as it should. We endorse the principle, recognized on occasion by the Comptroller General, that general executive authority of this sort may be invoked from time to time to permit an agency to reimburse its own employees for personal expenses incurred by them as a necessary consequence of faithful and lawful performance of their official duties. Indeed, although we express no firm view on this point, we see no reason why authority of this sort cannot be invoked by this or any other agency to reimburse blameless employees for personal expenses incurred by them *in litigation,* provided it is clear on the facts of each case that the expenses were incurred as a necessary consequence of due performance of an official duty.

But even if that principle is valid, we think it has no application in the present context. The question is whether this Department could reimburse the defendants for the cost of arguing in court that the

United States can be held liable for payment of attorney fees under § 1988. An argument of that sort would not serve to establish the legality of any official action by these defendants or by this agency; it would, if accepted, enlarge the legal liabilities of the United States. It would not directly support any position taken by the government; on the contrary, it would be advanced in opposition to the position taken by this agency in this very case. It might or might not serve the personal interests of the defendants; but if it did serve them, it would do so in precisely the same way that any private claim against the public fisc (*e.g.*, a claim for indemnity or contribution) might serve the interests of government employees in circumstances in which the question is ultimately one of substituting public for private liability. It is a claim that they are fully entitled to make, but we think it would be very difficult to regard it as a claim that they must make as a necessary consequence of the duties cast upon them by their public employment, and it would therefore be difficult to regard the attendant expense as an expense they must "necessarily" incur within the meaning of the reimbursement rule.

II.

You have advised the defendants: (1) that the Department will withdraw as their counsel in this phase of the case if they decide that they should lend their support to the claim that the United States may be held liable for the fee award (either to the plaintiffs directly or to themselves by way of indemnity or contribution); (2) that in any event, the United States will attempt to intervene in the case to support the position that the award against the United States was improper; but (3) that DOJ attorneys will continue to represent them if they desire the representation to continue and agree in writing that DOJ attorneys will be free to take the position that the fee award cannot be taxed against the United States. You have also advised the defendants that a failure on their part to oppose the position taken by the United States in this case may later be regarded by a court as the equivalent of a waiver of their right, if any, to claim that the United States is liable to anyone (including them) for any part of the fee award.

You have asked whether, in our view, the option described in (3) presents any substantial ethical difficulty. For the reasons given below, we think it does not.

It is for these defendants, acting with the advice of competent lawyers, to determine how they shall conduct their personal defense. Whether in the long run it will serve their personal interests to support the view that the United States can be held liable for payment of the fee award, or whether it will serve them better to stand now with the United States and be represented by DOJ lawyers in this phase of the case, is a question as to which this Department cannot properly advise them, given the conflicting governmental position. The Civil Division has suggested that they should therefore consult private counsel, and the Civil Division has offered to withdraw if they conclude that the better course is to oppose the governmental position. The Civil Division has said that it will continue to represent them in this phase of the case only if they decide to go forward in a way that is consistent with the governmental position, but as regards the ethics of withdrawal versus the ethics of continued representation, it seems to us that having promised at the outset that the Department would represent their interests to the extent that those interests coincide with the interests of the United States, the ethical difficulty would lie with an adamant refusal to proceed with representation, not with a continuing effort to do what we promised to do at the outset, assuming of course that the defendants, after consultation with independent counsel, conclude that this is the better course.

Putting its unique features to one side, this case is very much like the routine civil action in which codefendants have a common interest in defeating all of the claims against all of them, even though each defendant may have an individual interest in giving reasons why his codefendants, not he, should respond in damages to the complaint. In that setting, it is clear that defendants are free as a matter of litigation strategy to subordinate the interests that divide them and to present a united front against the plaintiff as to the law or the facts. The choice is theirs; and if, after consultation with independent counsel, they choose to present a united front, there is no ethical difficulty in engaging one lawyer to present their united position. *Cf. Aetna Ins. Co.* v. *United States,* 570 F.2d 1197 (4th Cir. 1978).

We do not know how the defendants will be advised in this case, but it is at least possible they will conclude that they will stand a better chance of escaping ultimate liability for payment of a fee award if they support the government's position and establish that there is no deep pocket from which part of the award can be paid; and in any event, they may conclude that they simply do not wish to oppose the government on this point. They are loyal employees. That, in essence, is their defense on the merits.

We have one or two additional observations to make. We express no view on the general question whether it is necessary or desirable to analyze this particular ethical problem by reference to the settled principles that govern the representation of "differing interests" by private attorneys. *See* Canon 5 and DR 5-105. This Office frequently draws upon those and other private-law principles in our effort to provide guidance to the Department in ethical matters; and it is true of course that by virtue of our own regulations the Code of Professional Responsibility governs our conduct here to the extent that the Code attempts to deal with the kinds of problems that confront us as government lawyers. But we need to keep in mind that we are often called upon to resolve representation questions that involve considerations quite different from those that are usually involved in private cases. Among these "different considerations" are the statutes that establish the office of the Attorney General and define his litigating and counseling functions. As we have suggested in part I of this opinion, these statutes impose overriding substantive limitations on what the Attorney General and the attorneys who work under him may and may not do in court.

Canon 5 and DR 5-105 contemplate that there is a limited class of cases in which a lawyer may undertake to represent the "differing interests" of "multiple clients." He may do this only if: (1) it is "obvious" that he can adequately represent the interest of each, and (2) each client consents to the representation "after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each." In other words, the rule envisions a situation in which a lawyer attempts to provide "adequate" representation for all of the interests of more than one client, even though there may be differences as between two or more of those interests. The rule does *not* contemplate a case of the kind presented here: a case in which a lawyer who is also an officer of the government (the Attorney General) undertakes to discharge a statutory duty to represent officers of the United States in civil litigation but, because of overriding statutory limitations on his authority, undertakes to represent their personal interests only to the extent that they coincide with the interests of the United States. He cannot and does not undertake to represent any personal interest that differs from the interests of the United States. He does not, in a word, undertake to represent "differing interests"; and he leaves it to the defendants, after consultation with independent counsel, to determine: (1) whether they do in fact have interests that differ from those of the United States; (2) whether their overall interests would be served by taking an independent course in the litigation under the representation of private counsel; or (3) whether their overall interests would be better served by adopting a strategy of alliance with the interests of the United States, as those interests are defined and represented by the Attorney General. If they choose the latter course, we think no ethical difficulty is presented by the Attorney General's willingness to accommodate their desire that he appear on their behalf to advance the interests that they hold in common with the United States. In the context of a case of this sort, representation of common interests after consultation with independent counsel is not representation of "differing interests," and in our view it threatens none of the dangers that Canon 5 is designed to prevent.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

Legislation Authorizing the Transfer of Federal Judges from One District to Another

Congress may by statute confer new duties on officers of the United States as long as those new duties are "germane" to their existing functions, without the necessity of reappointment under the Appointments Clause of the Constitution. *Shoemaker* v. *United States,* 147 U.S. 282, 301 (1893).

Constitutionality of legislation authorizing the transfer of a Federal district judge from one district to another depends upon whether the transfer is viewed as the modification of an existing position or the filling of an entirely new office.

Transfer provision goes against a tradition of regionalism in the selection of district judges, and potentially infringes upon the President's power to appoint judges to the District of Columbia bench, and should be opposed on policy grounds even if not clearly forbidden by the Appointments Clause.

March 28, 1980

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGISLATIVE AFFAIRS

This responds to your request for our opinion on the constitutionality of certain provisions of S. 1477* dealing with the temporary assignment of federal judges to administrative positions within the judicial branch. In particular, you requested our opinion regarding the constitutionality of a provision in § 304(a) of the bill that would permit a judge in active service at the time he assumed the administrative position to elect, upon vacating it, either to return to active service in his home district (or circuit), or to "assume active service as a judge in the circuit of the District of Columbia." For the reasons set forth below, we believe this provision raises novel and troublesome constitutional questions and, as a matter of policy, is ill-advised.

The portions of S. 1477 preceding § 304 would authorize federal judges to serve in certain specified administrative positions within the judiciary (§ 301),[1] authorize the President to appoint successors to fill vacancies on the bench resulting from such service (§ 302),[2] and establish the District of Columbia as the "official duty station" of the judge-administrators (§ 303). There is no minimum or maximum time specified for terms of service as a judicial administrator.

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*NOTE: S. 1477, a bill "To Provide for Improvements in the Structure and Administration of the Federal Courts, and for Other Purposes," passed the Senate in October of 1979, but was not reported out of committee in the House. Ed.

[1] The specified statutory administrative positions are: Administrative Assistant to the Chief Justice (appointed by the Chief Justice pursuant to 28 U.S.C. § 677), Director of the Administrative Office of the United States Courts (appointed by the Supreme Court under 28 U.S.C. § 601), and Director of the Federal Judicial Center (appointed by a board of judges chaired by the Chief Justice, pursuant to 28 U.S.C. §§ 621(a) and 624(1)).

If a judge elects to return to his home court at the end of his tour of administrative duty, he may do so without loss of seniority. § 304(b). If he elects the alternative "transfer" option, however, and assumes a seat on a federal court in the District of Columbia, his status is not so clear. It is, for example, not clear whether he would be considered to have filled a vacancy on the District of Columbia court, or whether there would automatically be created an additional seat on that court. It is not stated whether a judge who decides to remain in the District of Columbia could subsequently reclaim a seat on his home court—or whether his initial decision not to return to that court would mean relinquishing that option. Finally, as your Office's memorandum points out, the bill is unclear as to whether a district court judge could, through the provision, "elevate himself" to the court of appeals.[3]

Stated in its simplest terms, the constitutional question raised by the transfer provision is whether a new presidential nomination, confirmation by the Senate, and appointment by the President are constitutionally required before a judge appointed to, for example, the Northern District of Iowa, may take a seat as a judge on the District Court for the District of Columbia. This question may be analyzed in terms of the relationship between the power of Congress under Art. I, § 8, cl. 18 of the Constitution to alter, enlarge, or restrict the functions of existing federal officers and the requirement of the Appointments Clause, Art. II, § 2, cl. 2, that appointments as officers of the United States be made in the manner prescribed in that Clause.[4] Such an analysis involves a reconciliation of the Supreme Court's decisions in *Shoemaker* v. *United States,* 147 U.S. 282, 301 (1893), and *Buckley* v. *Valeo,* 424 U.S. 1, 118–36 (1976).

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[2] When a successor is appointed, any vacancy resulting from the death, resignation or retirement of the judge temporarily assigned will not be filled; and, if the judge resumes active service in his home district, the first vacancy created on that court shall not be filled. This scheme parallels that provided under present law for situations in which a sitting judge is certified as disabled and an additional judge is appointed to carry on the business of the court. *See* 28 U.S.C. § 372(b).

[3] The complete failure to spell out these important operational factors in the bill has not to date been cured in its legislative history. Indeed, there is no indication that the transfer provision was even noticed, much less discussed, by anyone during the bill's consideration in the Senate. The Administration's court improvements bill contained no provisions dealing with administrative service by active judges. According to an article in The Washington Post on December 22, 1979, credit for developing the particular provision dealing with transfer to the District of Columbia courts is claimed by the Director of the Federal Judicial Center. Its ostensible purpose was to encourage sitting judges to accept the administrative posts and relocate to Washington.

[4] The clause is:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Shoemaker stated the principle that Congress may, by statute, confer new duties on officers of the United States at least where the new duties are "germane" to their existing functions, without the necessity of reappointment under the Appointments Clause. *Buckley* held that Congress may not itself appoint officers of the United States. The propriety of the proposed transfer provision depends, therefore, on whether the shift from one district to another involves the modification of an existing position or the filling of an entirely new office.[5]

There are reasonable arguments to support either conclusion, and precedent does not suggest that one is necessarily the correct view. On the one hand, a judge's commission includes the name of the district or circuit in which he is intended to serve, and his appointment and confirmation are predicated on the expectation that he will in fact be serving in that district or circuit.[6] On the other hand, service as a judge on one federal court is surely "germane" to judicial service on another, and raises none of the type of separation of powers problems that apparently structured the Court's opinion in *Shoemaker.*[7] Under current law, the Chief Justice of the United States may assign any district judge to temporary service in another circuit, either on a district court or on the court of appeals. 28 U.S.C. § 292(d). However, during such temporary service, judges retain the titles appurtenant to their permanent appointments, and are generally memorialized in published opinions as "sitting by designation" on the court to which they have been temporarily assigned.[8]

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[5] The question whether Congress may permit a district judge, through the proposed transfer provision, to elevate himself to the appellate level seems to us to present no separate constitutional issues. Article III recognizes only two types of federal courts, the Supreme Court and "such inferior Courts as the Congress may from time to time ordain and establish." The offices of district judge and circuit judge are therefore not constitutionally distinct. Indeed, in the early years of our history, there were no judges separately appointed to the circuit courts, and district judges regularly sat as judges on those courts along with Justices of the Supreme Court. It was not until 1869 that Congress authorized the appointment of circuit judges. Act of April 10, 1869, 16 Stat. 44. *See* Hart & Wechsler, The Federal Courts and the Federal System 38 (1973). If there is no constitutional bar to Congress' transferring district judges from district to district, we think there would be no constitutional bar to their being shifted from district to appellate court service.

[6] There is nothing in the Constitution that would preclude Congress from deciding to make all district and/or circuit judgeships interchangeable, so that an appointment would be generally valid for any post in the inferior federal courts to which an individual might from time to time be assigned. There have in the past been cases in which Congress has authorized the appointment of a judge to serve in more than one district, or to serve as a "roving" judge among several districts. *See, e.g.*, Act of July 24, 1946, 60 Stat. 654. There have been cases in which a judge appointed to serve in one district was subsequently shifted by congressional act to a newly created district in the same state, without being reappointed and reconfirmed. In no case, however, has a judge been appointed to one court and subsequently been permitted to shift permanently to another previously existing court.

[7] In commenting on the *Shoemaker* case, in which officers of the United States Army were designated by Congress to serve as Park Commissioners, Corwin describes the limits of Congress' power to increase or change the duties of an existing office in terms of the principle of separation of powers. Corwin, The President, Office and Powers, 1787–1957 at 75 (1957).

[8] A similar provision dealing with the temporary assignment of judges of the Court of Claims or the Court of Customs and Patent Appeals to judicial duties in either a district court or a court of appeals,

Continued

While we cannot conclude with assurance on the question of the transfer provision's constitutionality, we think that two considerations warrant the Administration's opposition to its inclusion in the court improvements bill. First, the transfer option is unique in the history of congressional regulation of the inferior federal courts, and would go against a tradition of regionalism in the selection of district judges that, if not constitutionally required, has about it an aura of constitutional respectability that should be disturbed only for compelling reasons. Second, the inroads that the transfer provision could theoretically make on the President's power to appoint judges to the District of Columbia bench make its adoption unwise as a matter of policy, even if not clearly forbidden under the Appointments Clause.

This conclusion is consistent with our recent advice on the reallocation of personnel in connection with the proposed merger of the Court of Claims and the Court of Customs and Patent Appeals. We advised that there appeared to be no constitutional objection to Congress' redesignating judges presently serving on one or the other of the two courts as judges of a merged court, and to carrying over trial judges of the Court of Claims as judges of a new United States Claims Court. We rested our opinion on our understanding that the functions of judges on the new court were sufficiently like those in the positions being abolished to view the legislative redesignation as a modification of an existing position under *Shoemaker*, rather than a legislative appointment to a new one, governed by *Buckley*. One important difference between the merger situation and the transfer proposal at issue here is that the former involves the end of one institution and the continuance of its major functions in another. It is reasonable, and important in terms of efficiency and institutional continuity, to provide in this context for the relocation of experienced and capable judicial personnel, and for their continuing to perform the functions of the office to which they were originally appointed. In addition, unlike the transfer provision, it could be said that the judges' functions on the merged court were within the contemplation of those who were in the first place responsible for their appointment and confirmation.

Although we have no reason to believe that the dire predictions of "court-packing" that have been made in connection with the transfer proposal [9] would ever be realized, we can more easily imagine a situation in which the President's prerogative to fill vacancies occurring on the District of Columbia bench would be seriously compromised by it. This would be particularly true if transferring judges were considered

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28 U.S.C. § 293(a), was upheld against a constitutional challenge in *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962). *Glidden* involved primarily questions under Article III, and there is no discussion in the Court's opinion of the Appointments Clause.

[9] *See, e.g., Bill Would Let Chief Justice Fill U.S. Bench Here,* The Washington Post, December 22, 1979, p. 1.

to have filled a vacancy on the District of Columbia court. Quite independently of any constitutional doubts we may have regarding the proposal, then, we believe it has little to commend it as a matter of policy.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Extraterritorial Apprehension by the Federal Bureau of Investigation

In the absence of an international law violation, a federal district court will not ordinarily divest itself of jurisdiction in a criminal case where the defendant's presence has been secured by his forcible abduction from the territorial limits of a foreign asylum state.

A forcible abduction, when coupled with a protest by the asylum state, is a violation of international law; there is, however, some precedent that complicity of asylum state officials in the abduction could be the predicate for a finding of no actual violation of the asylum state's sovereignty.

Civil liability on the part of the United States or participating government officials resulting from a fugitive's forcible apprehension in a foreign country will depend on the status of the operation under international law; liability could be predicated on theories of constitutional or common law tort, or on a violation of international law.

The Federal Bureau of Investigation has no authority to apprehend and abduct a fugitive residing in a foreign state without the asylum state's consent.

In the absence of asylum state consent, federal officials may be subject to extradition to the asylum state for kidnapping.

March 31, 1980

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

You have requested that this Office advise you on the implications of a proposed operation of the Federal Bureau of Investigation (FBI) that might entail entry of American agents into a foreign country and forcible apprehension of a fugitive currently residing there. It is to be assumed that the foreign country (hereinafter "asylum state") would file a pro forma protest to the fugitive's apprehension and return to the United States. We also assume that the actual apprehension would be made by FBI agents, although some elements of the local police force might provide physical surveillance and aid in the neutralization of bodyguards during the actual apprehension.

The proposed operation raises the following, interrelated legal issues: the implications of the seizure for the pending criminal prosecutions of the fugitive, the legal status of the operation under existing treaties and settled principles of international law, and the possibility of civil liability on the part of the United States or participating government officials. This operation is unorthodox and, therefore, prompts a number of legal questions that are of first impression. Although we will discuss all the above legal questions separately, we think that the fundamental legal issue presented by this operation is under what circumstances does the FBI, as a matter of United States law, have the authority to make an extraterritorial apprehension. Although the question is not free from doubt, we conclude that the FBI only has lawful authority when the asylum state acquiesces to the proposed operation. Since we are to assume that a pro forma protest to the operation would be filed, that fundamental condition would probably not be satisfied here.

I. Implications for Criminal Prosecutions of Extraterritorial Apprehension that Is Subject of Protest

The Supreme Court has consistently stated "that the power of a court to try a person for crime is not impaired by the fact that he [has] been brought within the court's jurisdiction by reason of a 'forcible abduction.' " *Frisbie* v. *Collins,* 342 U.S. 519, 522 (1952).[1] It has rejected arguments that such abductions constitute violations of the Due Process Clause, and has reiterated the vitality of this conclusion in a recent Term. *Gerstein* v. *Pugh,* 420 U.S. 103, 119 (1975). Lower courts, particularly the Court of Appeals for the Second Circuit, have suggested, however, that under some circumstances a federal court might divest itself of jurisdiction as a result of the manner in which the defendant was brought before it.

The most sweeping statement of these circumstances is to be found in *United States* v. *Toscanino,* 500 F.2d 267 (2d Cir. 1974). There the Second Circuit confronted allegations that Toscanino, a citizen of Italy, was kidnapped in Uruguay by agents in American employ, tortured and interrogated for 17 days in Brazil with the knowledge of and sometimes in the presence of United States officials, and finally drugged and put on a commercial flight to the United States where he was convicted of narcotics violations.[2] Questioning the current vitality of the *Ker-Frisbie* doctrine, the Second Circuit relied on *Rochin* v. *California*, 342 U.S. 165 (1952), in concluding that the concept of due process has evolved such that a court must now "divest itself of jurisdiction over the person where it has been acquired as the result of the Government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." 500 F.2d at 275.[3] If on remand Toscanino's allegations were proven true, the Second Circuit saw a due process violation inherent in the bribery of a foreign official, the violence and brutality of the abduction, the violations of international law, and the failure to attempt extradition of Toscanino.[4]

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[1] These propositions are often referred to as the *Ker-Frisbie* doctrine. In the leading case, *Ker* v. *Illinois,* 119 U.S. 436 (1886), Ker was convicted in the Illinois state courts after being forcibly abducted in Peru. Formal extradition had been arranged among the Governor of Illinois, the U.S. Secretary of State, and Peruvian officials, but the individual who was sent to accompany Ker back to the United States did not present the extradition papers upon arrival in Peru. It was therefore a "clear case of kidnapping within the confines of Peru." *Id.* at 443. Although the apprehending agent might be subject to criminal prosecution in Peru, the Court found that American law afforded the apprehended fugitive no protection.

Frisbie v. *Collins,* 342 U.S. 519 (1952), involved an interstate abduction. Michigan officers forcibly seized Collins in Chicago. Acknowledging that the Michigan officers might be subject to prosecution under the Federal Kidnapping Act, the Court held that as far as Collins was concerned, "due process of law is satisfied when one present in Court is convicted of crime after having been fairly apprised of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will." *Id.* at 522. *See also Mahon* v. *Justice,* 127 U.S 700, 708 (1888).

[2] Toscanino alleged that he was denied sleep and nourishment for days, fed intravenously at survival levels, forced to walk for hours on end, and kicked and beaten. He claimed his fingers were pinched by metal pliers; his eyes, nose, and anus washed in alcohol; and his genitals subjected to electric shock. There had been no attempt by the United States to extradite Toscanino. *Toscanino,* 500 F.2d at 270.

Subsequent Second Circuit cases have read *Toscanino* narrowly and other circuits have refused to follow it. In *United States ex rel. Lujan* v. *Gengler*, 510 F.2d 62 (2d Cir.), *cert. denied*, 421 U.S. 1001 (1975), the Second Circuit emphasized that *Toscanino* did not mean that "*any* irregularity in the circumstances of a defendant's arrival in the jurisdiction could vitiate the proceedings of the criminal court," but rather was concerned with the "cruel, inhuman and outrageous treatment" that Toscanino allegedly received.[5]

Thus the court concluded that although Lujan was forcibly abducted from Bolivia, the lack of any allegation of the type of "shocking governmental conduct" involved in *Toscanino* obviated any application of the rationale of that case. *Lujan*, 510 F.2d at 66.[6] It did, however, reserve the question whether the fact that an abduction is in violation of international law requires dismissal of the criminal indictment: either because such illegal governmental conduct constitutes a violation of due process or because a federal court should, as a matter of judicial administration, refuse to be a party to official misconduct. *Id.* at 68.[7] The court perceived no international law violation in *Lujan* because there had been no protest by the foreign governments involved. *Id.* at 67.

Other circuits have resolutely invoked the *Ker-Frisbie* doctrine to dismiss arguments that American courts should divest themselves of their criminal jurisdiction over a defendant because his presence was procured through a forcible abduction.[8] Moreover, a number of those courts have suggested that jurisdiction should be retained even if the abduction violates international law.[9] We note, however, that there is apparently no reported case where the abduction was the subject of a formal diplomatic protest by the asylum state.

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[3] The court did not have the benefit of the Supreme Court's endorsement in *Gerstein* v. *Pugh*, 420 U.S. at 119, of the *Ker-Frisbie* doctrine.

[4] The court of appeals noted that even if the *Ker-Frisbie* doctrine was still good law, it could make use of its supervisory power over the district court to upset Toscanino's conviction in order "to prevent district courts from themselves becoming 'accomplices in willful disobedience of law.'" *Toscanino*, 500 F.2d at 276, quoting *McNabb* v. *United States*, 318 U.S. 332, 345 (1943). On remand the district court found that Toscanino's allegations had no basis in fact. *United States* v. *Toscanino*, 398 F. Supp. 916 (E.D. N.Y. 1975).

[5] 510 F.2d at 65 (emphasis in original). *See also United States* v. *Lira*, 515 F.2d 68 (2d Cir.), *cert. denied*, 423 U.S. 847 (1975) (*Toscanino* distinguished because no direct United States involvement in torture by Chilean police).

[6] Lujan, a licensed pilot, alleged that while residing in Argentina, he was hired by an individual to fly to Bolivia. He claimed that his employer was in fact paid by American agents to lure Lujan out of Argentina. In Bolivia, Lujan was arrested by Bolivian police who were also allegedly paid by American agents. He was ultimately put on a plane by Bolivian and American agents and formally arrested upon his arrival in the United States. *Lujan*, 510 F.2d at 63.

[7] *See supra*, note 4.

It is our opinion that even where an abduction is a technical violation of international law, a federal district court should not divest itself of jurisdiction over the fugitive's criminal prosecution.[10] We think this position is dictated by logic and precedent. In *Frisbie,* 342 U.S. 522, the Supreme Court assumed that the conduct of the Michigan authorities who abducted Collins from Chicago constituted a violation of the Federal Kidnapping Act. It concluded, however, that the Kidnapping Act "cannot fairly be construed so as to add to the list of sanctions detailed a sanction barring a state from prosecuting persons wrongfully brought to it by its officers. It may be that Congress could add such a sanction. We cannot." *Frisbie,* 342 U.S. at 523. A dismissal remedy for a violation of international law is even less appropriate. The interests protected by international law are those of sovereign nations. Any interest of individuals is at best derivative. *See Lujan,* 510 F.2d at 67. By contrast, the Federal Kidnapping Act is unquestionably for the protection of individuals; yet under the principles of *Frisbie,* a forcible abduction in violation of that Act does not divest an American court of jurisdiction.

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[8] *E.g., United States* v. *Postal,* 589 F.2d 862, 865 (5th Cir.), *cert. denied,* 444 U.S. 832 (1979) (arrest by Coast Guard upon the high seas); *United States* v. *Marzano,* 537 F.2d 257, 271–72 (7th Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977) (allegations of unlawful arrest in and forcible abduction from Grand Cayman Island; *Toscanino* characterized as only departure from *Ker-Frisbie* doctrine); *Waits* v. *McGowan,* 516 F.2d 203 (3d Cir. 1975) (allegedly illegal removal from Canada to New York); *United States* v. *Cotten,* 471 F.2d 744, 747–49 (9th Cir.), *cert. denied,* 411 U.S. 936 (1973) (forcible removal from Vietnam).

There is a standard formulation of the *Ker-Frisbie* doctrine reiterated in these cases:

> It has long been held that due process has been satisfied when a person is apprised of the charges against him and is given a fair trial. The power of a court to try a person is not affected by the impropriety of the method used to bring the defendant under the jurisdiction of the court [citing *Ker* and *Frisbie*]. Once the defendant is before the court, the court will not inquire into the circumstances surrounding his presence there.

United States v. *Marzano,* 537 F.2d at 271.

[9] *E.g., Postal,* 589 F.2d at 873 ("This proposition, the so-called *Ker-Frisbie* doctrine, is equally valid where the illegality results from a breach of international law not codified in a treaty"); *United States* v. *Cadena,* 585 F.2d 1252, 1261 (5th Cir. 1978) *United States* v. *Winter,* 509 F.2d 975, 984–86 (5th Cir.), *cert. denied,* 423 U.S. 825 (1975) (*Ker-Frisbie* doctrine makes it unnecessary to inquire whether arrest by Coast Guard within territorial waters of Bahamas violated international law); *Autry* v. *Wiley,* 440 F.2d 799, 802–03 (1st Cir.), *cert. denied,* 404 U.S. 886 (1971).

Oftentimes courts simply do not discuss the status of the abduction under international law. *E.g., Marzano,* 537 F.2d 257; *United States* v. *Herrera,* 504 F.2d 859 (5th Cir. 1974); *United States* v. *Vicars,* 467 F.2d 452 (5th Cir. 1972), *cert. denied,* 410 U.S. 967 (1973).

[10] *Cadena,* 585 F.2d at 1261 ("no basis for concluding that violations of these international principles must or should be remedied . . . by dismissal of the indictment unless Fourth Amendment interests are violated"); *Autry* v. *Wiley,* 440 F.2d at 801–02; *see also Waits* v. *McGowan,* 516 F.2d 203, 208 (3d Cir. 1975) ("the protections or rights which accrue to the extradited person primarily exist for the benefit of the asylum nation . . ., whereas plaintiff's complaint alleges violation of rights of citizens of the demanding nation (The United States of America)").

American courts are charged with the vindication of international law principles to the extent those principles are consonant with American law. *The Paquete Habana,* 175 U.S. 677, 700 (1900). The thrust of the abduction cases is that relinquishing criminal jurisdiction is not the means to vindicate those principles.

In sum, we are of the opinion that in the absence of an international law violation, a federal district court will not ordinarily divest itself of jurisdiction in a criminal case where the defendant's presence has been secured by forcible abduction from the territorial limits of a foreign asylum state. Nor should it do so where there is an international law violation. However, since you have advised us that you expect a pro forma diplomatic protest by the asylum state and that the fugitive's prosecution will proceed in the Southern District of New York, it is necessary to examine the international law implications of this operation more closely. As we have noted, the Second Circuit has expressly reserved the question whether a violation of international law should result in relinquishment of criminal jurisdiction over the suspect.

II. International Law Implications of the Proposed Operation

There is one line of authority in American jurisprudence that does create an exception to the *Ker-Frisbie* doctrine. As Congress by statute can modify the jurisdiction of federal courts, so too can a treaty. Thus the Supreme Court has held that a treaty can divest federal courts of jurisdiction in certain circumstances if such was the intent of the document. *Cook* v. *United States,* 288 U.S. 102, 112 (1933); *Ford* v. *United States,* 273 U.S. 593, 610–11 (1927). As the Fifth Circuit recently noted, for a treaty to have such an effect, it must be self-executing or implemented by statute.[11]

There are two arguably relevent treaties between the United States and the asylum state that must be considered in this case. They are the extradition treaty between the two countries and the United Nations Charter. It is well-established that the existence of an extradition treaty *simpliciter* does not defeat U.S. jurisdiction over a fugitive apprehended outside the extradition mechanism.[12] And there is nothing in the terms of the existing extradition treaty that suggests that this government has yielded jurisdiction over U.S. nationals who have committed crimes in this country simply because they obtained refuge in the asylum state.[13]

The second relevant treaty is the United Nations Charter to which both the United States and the asylum state are signatories.

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[11] *Postal,* 589 F.2d at 875–76. A treaty does not provide rules of decision for American courts unless that is the intent of the document, *i.e.,* the treaty is self-executing. *Whitney* v. *Robertson,* 124 U.S. 190, 194 (1888); *Foster* v. *Neilson,* 27 U.S. (2 Pet.) 253, 314 (1829). Of course, implementing domestic legislation does provide rules of decision capable of judicial enforcement.

[12] *Ker,* 119 U.S. at 444 (1886); *Waits* v. *McGowan,* 516 F.2d at 206–08; *Lujan,* 510 F.2d at 66; *United States* v. *Sobell,* 244 F.2d 520, 524–25 (2d Cir.), *cert. denied,* 355 U.S. 873 (1957).

[13] By its terms it does not constitute an agreement that extradition will be the exclusive means of obtaining custody of a fugitive. Nor does it purport to limit the criminal jurisdiction of either sovereign.

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

U.N. Charter, art. 2, para. 4.

This provision has been at issue in a number of forcible abduction cases, including *Toscanino* and *Lujan.* The leading precedent on forcible abduction's status under the United Nations Charter is that involving the apprehension of Adolph Eichmann in Argentina by Israeli agents. Argentina objected to the United Nations Security Council, which subsequently adopted a resolution:

> Considering that the violation of the sovereignty of a Member State is incompatible with the Charter of the United Nations . . . [and n]oting that the repetition of acts such as that giving rise to this situation would involve a breach of the principles upon which international order is founded creating an atmosphere of insecurity and distrust incompatible with the preservation of peace . . . [the Security Council requests] the Government of Israel to make appropriate reparation in accordance with the Charter of the United Nations and the rules of international law.[14]

Commentators have construed this action to be a definitive construction of the United Nations Charter as proscribing forcible abduction in the absence of acquiescence by the asylum state.[15]

It is our opinion that even if the operation under consideration is construed to be a violation of the United Nations Charter, the criminal jurisdiction of American courts is unaffected. We base our opinion on the grounds that the United Nations Charter is not a self-executing treaty and that it was not intended by the United States at the time of ratification to affect the criminal jurisdiction of federal courts. There is not a great deal of case law on these points. However, as the Fifth Circuit observed in *Postal*, 589 F.2d at 876, the self-executing nature of a treaty is a matter of intent. The broad sweep and hortatory tone of Article 2 belies any argument that a binding, self-executing limitation on the criminal jurisdiction of American courts is evident in its terms.[16]

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[14] Quoted in W. Bishop, International Law 475 n.52 (1962).

[15] *E.g., Lujan,* 510 F.2d at 66–68; Abramovsky & Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction, or Irregular Rendition?,* 57 Or. L. Rev. 51, 63 (1977); *see* Silving, *In re Eichmann: A Dilemma of Law and Morality,* 55 Am. J. Int'l L. 307 (1961).

[16] *See generally,* L. Goodrich, E. Hambro & A. Simmons, Charter of the United Nations: Commentary and Documents 43–55 (1969).

And courts that have considered provisions of the United Nations Charter have concluded that they are not self-executing.[17]

It is a more difficult question whether the proposed operation is a violation of general international law principles, albeit not a violation of a self-executing treaty. As Judge Kaufmann indicates in his majority opinion in *Lujan*, it appears to be the case that a forcible abduction, when coupled with a protest by the asylum state, is a violation of international law. *Lujan*, 510 F.2d at 67. It is regarded as an impermissible invasion of the territorial integrity of another state. Since the asylum state would hardly attest to the fact that the protest is pro forma, there is little to be gained in the instant case by characterizing it as such. Nor do there appear to be any doctrines of self-help or self-defense applicable in this context.

There may be, however, some precedent in international law for the argument that complicity of asylum state officials in the abduction robs the asylum state's protest of its import under international law. In 1911 the Permanent Court of Arbitration at The Hague declined to order the return to France of one Savarkar. Savarkar had escaped to France from a British ship, only to be returned to the British by a French policeman. The Court of Arbitration found that the French official's cooperation avoided any violation of French sovereignty that might otherwise have occurred.[18] Likewise, the complicity of the asylum state's police in the proposed operation could be the predicate for a finding of no actual violation of the asylum state's sovereignty. One obvious drawback to this argument is that it forces this government to put in issue the identity of its asylum state collaborators. We also note that the Court of Arbitration in the Savarkar case found that the British officials had no reason to know that the French official was not acting with the approval of the French government. No similar claim of ignorance could be made about the operation under consideration.

We conclude that the best assumption for purposes of analyzing the implications of the proposed operation is that although not a violation of a self-executing treaty, it would violate international law. That significantly heightens the litigation risks in the Second Circuit, which has explicitly declined to define the implications of an international law violation on criminal jurisdiction.

III. Civil Liability

We think the case for obtaining at least the acquiescence of the asylum state is compelling when the criminal litigation risks are coupled with the possibility of civil liability.[19] Civil liability will turn to a substantial degree on whether the FBI is authorized to conduct this operation and that, in our view, will depend on the status of the operation under international law.

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[17] *Sei Fujii* v. *State*, 242 P.2d 617, 620 (Cal. 1952) (human rights provisions of U.N. Charter not self-executing); *Pauling* v. *McElroy*, 164 F. Supp. 390, 393 (D.D.C.), *aff'd*, 278 F.2d 252 (D.C. Cir.), *cert. denied*, 364 U.S. 835 (1960) (finding other sections of Charter not self-executing).

[18] The case is discussed in *Lujan*, 510 F.2d at 67, and can be found at *Judicial Decisions Involving Questions of International Law*, 5 Am. J. Int'l L. 490, 520 (1911).

In *Ker* v. *Illinois,* the penultimate paragraph in the Supreme Court's opinion reads as follows:

> It must be remembered that this view of the subject does not leave the prisoner or the Government of Peru without remedy for his unauthorized seizure within its territory. Even this treaty with that country provides for the extradition of persons charged with kidnapping, and on demand from Peru, Julian [the party who abducted Ker], could be surrendered and tried in its courts for this violation of its laws. The party himself would probably not be without redress, for he could sue Julian in an action of trespass and false imprisonment, and the facts set out in the plea would without doubt sustain the action. Whether he could recover a sum sufficient to justify the action would probably depend upon moral aspects of the case which we cannot here consider.

119 U.S. at 444.

As the above quotation indicates, the question of civil liability is certainly an open one, as is the criminal liability of the apprehending agents and others under asylum state law. We discuss criminal liability in Part IV below.

There appear to be three potential civil liability theories: constitutional violations by American agents, common law torts committed by American agents (*i.e.,* false imprisonment), and violation of international law. The potential defendants are the federal government and individual government officials involved in this operation.[20]

By virtue of the Federal Tort Claims Act (FTCA), the United States has waived sovereign immunity with respect to the torts of assault, false imprisonment, and false arrest. 28 U.S.C. §§ 2674, 2680(h). The authorities are split on whether that waiver includes related constitutional torts.[21] There is, however, unanimous, albeit limited, authority that even for common law torts, the FTCA is not a total waiver of sovereign immunity. In the leading case, the Fourth Circuit has held that immunity that is available to government officers sued in their personal capacities can also be asserted by the government when it is sued in their stead under the FTCA.[22] Therefore, the key to analyzing the potential for civil liability is to determine whether government officials involved in this operation would enjoy either an absolute or qualified immunity if sued individually for damages.

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[19] By "acquiescence" we do not mean formal endorsement. It is sufficient that the asylum state agree not to protest the apprehension.

[20] Those who authorize, direct, participate in, or ratify the operation are potentially liable.

[21] *Compare Norton* v. *United States,* 581 F.2d 390 (4th Cir.), *cert. denied,* 439 U.S. 1003 (1978), *with Birnbaum* v. *United States,* 588 F.2d 319 (2d Cir. 1978). *Birnbaum,* however, did not have to consider the effects of the 1973 amendments to the FTCA. We think that the best assumption in light of those amendments is that the FTCA does waive sovereign immunity for damage actions predicated on Fourth Amendment violations. Boger, Gitenstein & Verkuil, *The Federal Tort Claims Act Intentional Torts Amendment: An Interpretative Analysis,* 54 N.C. L. Rev. 497 (1976).

The Supreme Court has held that federal officials have a qualified immunity from damage actions in cases of constitutional torts, and that immunity at least that great governs common law torts.[23] Qualified immunity will be available for the proposed operation if it is within the outer limits of the FBI's authority and is conducted in good faith with a " 'reasonable belief in the validity of the arrest and search and in the necessity for carrying out the arrest and search in the way the arrest was made and the search was conducted.' "[24] For reasons stated below, we think those conditions are satisfied only if the operation is conducted with the acquiescence of the asylum state.

Law enforcement officers are acting beyond the "outer limits" of their authority when they act beyond their jurisdiction.[25] As the instant operation is presently conceived, the FBI and its agents are likely to be found not acting within these jurisdictional bounds because U.S. agents have no law enforcement authority in another nation unless it is the product of that nation's consent. We have on prior occasions counseled that the FBI has lawful authority under United States law to conduct investigations in a foreign country provided those investigations relate to a matter within the statutory jurisdiction of the FBI. While no statute explicitly authorizes the FBI to conduct investigations outside of the United States, 28 U.S.C. § 533(1) contains no geographical restrictions and its general authorization—to detect and prosecute crimes against the United States—would appear to be broad enough to sanction activity toward this end no matter where it was undertaken. But we have coupled that opinion with the recommendation that any operations strictly adhere to local law and function with the knowledge and at least tacit approval of the country involved. We think any argument that § 533 gives the FBI authority to make forcible arrests anywhere in the world is at best tenuous; the sounder interpretation is that its authority is limited, like that of the United States generally, by the sovereignty of foreign nations. As we indicated in Part II, the asylum state's sovereignty would be "violated" for purposes of subsequent litigation if it filed a formal protest.

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[22] *Norton*, 581 F.2d at 394–97; *see Daniels* v. *United States*, 470 F. Supp. 64 (E.D.N.C. 1979).

[23] *Butz* v. *Economou*, 438 U.S. 478, 506–08 (1978) (holding that only a qualified immunity is available for most constitutional torts); *Barr* v. *Matteo*, 360 U.S. 564 (1959) (absolute immunity available for some common law torts); *see Expeditions Unlimited, Aquatic Enterprises, Inc.* v. *Smithsonian Institution*, 566 F.2d 289 (D.C. Cir. 1977), *cert. denied*, 438 U.S. 915 (1978); *Granger* v. *Marek*, 583 F.2d 781, 784 (6th Cir. 1978).

[24] *Norton* v. *United States*, 581 F.2d at 393 (quoting *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 456 F.2d 1339, 1348 (2d Cir. 1972)).

[25] *E.g., Bates* v. *Clark*, 95 U.S. 204, 208–10 (1877) (no official immunity for seizure not made in Indian country because relevant statute only authorized seizure in Indian country). *Bates* and similar cases are discussed approvingly in *Butz* v. *Economou*, 438 U.S. at 489–95.

Our conclusion regarding the scope of § 533 is dictated by two distinct but related lines of analysis. A conventional statutory construction rule regarding the scope of an official's authority states that where a statute imposes a duty, it authorizes by implication all reasonable and necessary means to effectuate such duty. Given the target's fugitive status and the inadequacy of extradition,[26] it can be forcefully argued that this operation is necessary if the FBI is to carry out its law enforcement mission under § 533. However, the *reasonableness* of the operation is questionable if it violates international law or United States law. All methods of rendition outside the traditional extradition mechanism have received substantial criticism from international law specialists and in academic journals. The tenor of these remarks is that such extraordinary means of apprehension undermine international order and breed disrespect for the traditional means of fostering cooperation and arbitrating disputes among nations.[27] Judges in abduction cases have expressed concern that such extraordinary apprehensions denigrate the rule of law in the name of upholding it.[28] We think that concern, when coupled with a U.S. or international law violation, may well lead courts to conclude that the activity lies beyond the jurisdiction of the FBI.[29]

The opinion of Chief Justice Marshall in *The Schooner Exchange* v. *McFaddon,* 11 U.S. (7 Cranch) 116, 136 (1812) suggests a second approach to defining the limits of the FBI's jurisdiction under § 533. The FBI's power cannot extend beyond those of the United States. The *de jure* authority of the United States is necessarily limited by the sovereignty of other nations:

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[26] We are assuming that it can be established that extradition is an inadequate means of apprehension in this case. We emphasize here the importance of an ability to make such a showing.

[27] *E.g.,* M. Bassiouni, International Extradition and World Public Order 121-201 (1974); and sources cited *supra,* note 16.

[28] Although he concurred in the result in *Lira,* 515 F.2d at 73, this concern prompted Judge Oakes to observe: "To my mind the Government in the laudable interest of stopping the international drug traffic is by these repeated abductions inviting exercise of [the court's] supervisory power in the interest of the greater good of preserving respect for law." *See also, Toscanino,* 500 F.2d at 276.

[29] It should be noted that this is to argue that the FBI has the authority to violate the local law of another country as long as that country does not object. We think three doctrines, although none is addressed directly to the question under consideration, conjoin to support this conclusion.

First, the "act of state" doctrine evinces "judicial deference to the exclusive power of the Executive over conduct of relations with other sovereign powers" and "precludes any review whatever of the acts of the government of one sovereign State done within its own territory by the courts of another sovereign State." *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, 763, 765 (1972) (opinion of Rehnquist, J.). We think that to say the FBI had no authority to apprehend the fugitive, despite the acquiescence of the asylum state, because such apprehension was in violation of local law is in fact to judge the actions of the asylum state—here its failure to enforce arguably applicable local law. Second, it is tantamount to giving an individual the right to dispute a nation's conception of its own sovereign interests in violation of the principle that only the sovereign has standing to assert and construe its interest. Third, there is the maxim that the penal laws of a foreign country are not enforced in the courts of this country, but must be enforced in the place where the violation occurs. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 413-14 (1964).

> The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.
>
> All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

11 U.S. (7 Cranch) at 136.

In short, both lines of analysis suggest that in the absence of asylum state consent, the FBI is acting outside the bounds of its statutory authority when it makes an apprehension of the type proposed here—either because § 533 could not contemplate a violation of international law or because the powers of the FBI are delimited by those of the enabling sovereign. Once the "authority" hurdle is surmounted, however, we think that the other parts of the good faith defense are readily met. There is ample probable cause and a number of outstanding bench warrants.

Assuming the operation goes forward without asylum state consent, it is necessary to examine more closely the civil liability theories that may be put forward by the fugitive. There are two constitutional arguments available to him. The first is that he is subject to an unreasonable search and seizure in violation of the Fourth Amendment. The second is the Fifth Amendment due process argument based on the logic of *Toscanino.* The Bill of Rights does apply to actions of American officials directed at American nationals overseas,[30] and it is our view that the proposed operation would have some Fourth Amendment problems due to the absence of asylum state consent.

The standard Fourth Amendment requirement for an arrest is that it be based on probable cause. *Beck* v. *Ohio,* 379 U.S. 89, 91 (1964); *Gerstein* v. *Pugh,* 420 U.S. at 111–12. "[W]hile the Court has expressed a preference for the use of arrest warrants when feasible . . . , it has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant." *Id.* at 113. Here we have warrants and probable cause. The Fourth Amendment problem stems instead from the FBI's lack of statutory authority for an extraterritorial apprehension that has not been sanctioned by the asylum state.

Where federal officials act without explicit statutory authority, the validity of an arrest in this country turns on whether it meets the standards for a valid citizen's arrest under state law.[31] If a court extrapolated that reasoning to the international context, the pertinent question would be the standards for a citizen's arrest in the asylum state.[32] The rule in the asylum state is that "[a]ny person may, with or without warrant or other legal process, arrest and detain another person who has committed a felony." Presumably this is a reference to domestic felonies; otherwise the statute would authorize arrests for crimes that are not punishable in domestic courts and are not the subject of an extradition order. Thus we think this asylum state statute could not afford to U.S. officials authority to arrest for U.S. felonies within the asylum state's territory. So in the absence of asylum state consent and the § 533 authority to arrest that comes with it, the fugitive has a plausible Fourth Amendment claim. In contrast, for reasons stated in Part I of this memorandum to support the conclusion that, in the absence of the brutality alleged in *Toscanino*, there is no due process violation warranting divestment of jurisdiction, we conclude that there would be no Fifth Amendment violation warranting a civil remedy.

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[30] *Reid* v. *Covert,* 354 U.S. 1, 5–6 (1957); *Berlin Democratic Club* v. *Rumsfeld,* 410 F. Supp. 144, 160–61 (1976).

We do not view a violation of international law as a legally sufficient *independent* basis for a civil action. The reason is the distinct compass of international law. Last February the Fifth Circuit observed in the analogous context of a vessel seizure:

> Since 1815 it has been established that redress for improper seizure in foreign waters is not due to the owner or crew of the vessel involved, but to the foreign government whose territoriality has been infringed by the action.[33]

The fugitive lacks standing to pursue the violation of international law.[34]

The final potential bases for civil liability on the part of the federal government and individual federal officials are the common law torts of false imprisonment, false arrest, assault and battery. And to the question of liability must be added the question of forum.

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[31] *See United States* v. *Di Re*, 332 U.S. 581, 589–92 (1948); *Alexander* v. *United States*, 390 F.2d 101 (5th Cir. 1968); *United States* v. *Viale*, 312 F.2d 595, 601 (2d Cir.), *cert. denied*, 373 U.S. 903 (1963).

[32] Of course, a court could also conclude that federal agents do not have any citizen's arrest privileges in the asylum state and therefore cannot avail themselves of citizen arrest standards to argue the validity of the seizure.

[33] *United States* v. *Conroy*, 589 F.2d 1258, 1268 (5th Cir. 1979); *see also The Richmond*, 13 U.S. (9 Cranch) 102, 103 (1815).

[34] Nor does the international law argument add to the fugitive's potential Fourth Amendment claims, except to the extent that it delimits the statutory authority of the FBI. As the Fifth Circuit has noted:

> Whether the search and seizure were Fourth-Amendment-unreasonable must be established by showing that interests to be served by the Fourth Amendment were violated, and not merely by establishing the violation of general principles of international law.

Cadena, 585 F.2d at 1264.

We note that by its terms the Federal Kidnapping Act is inapplicable in the context of the proposed operation. It pertains to abductions "within the special maritime and territorial jurisdiction of the United States." 18 U.S.C. § 1201(a)(2). *But see Toscanino*, 500 F.2d at 276.

Although a civil suit in the asylum state against U.S. officials is theoretically possible, it is an unlikely course for the fugitive to take because of the obvious logistical problems, the fact the United States would not be amenable to suit there, and difficulties the asylum state courts would have in obtaining personal jurisdiction over individual government officers. It is much more likely that any action for common law torts would be instituted in the United States, and we think such an action could be maintained in this country.

According to private international law, injuries to a person or personal property of another are transitory and the right to redress follows the defendant to foreign lands.[35] This principle has been recognized in the United States.[36] All that is necessary is that the defendant be found within a jurisdiction in this country. The law to be applied is normally that of the site of the tortious conduct—the asylum state in this case [37]—although we think American law would still govern the question of immunity.[38] It is always possible that the fugitive would be nonsuited because a court regards the cause of action as repugnant to the policies of the forum state. But the *dicta* in *Ker* about damage actions make that result less certain,[39] and we think that in the absence of an immunity defense the United States and individual federal officials could be held liable for false imprisonment.

The law of the place of the tort also usually governs the damage award.[40] Exemplary damages are available under English common law, and consequently asylum state law, as are damages for nervous shock.[41] By their very nature, the size of such awards is impossible to predict; we can only advise that exemplary damages would not be available in an action against the United States.[42] Although there is no precedent on point, we think that it is unlikely that an American court would be receptive to an argument that a fugitive should be compensated for his lost opportunity to evade the lawful processes of the United States. Such an argument suggests a personal "right of asylum," a right explicitly rejected in *Ker*, and the argument could be properly rebuffed as against the public policy of the forum. Also injunctive relief, ordering that the fugitive be returned to the asylum state, is squarely inconsistent with *Ker*. We note that there is no provision for indemnification of government officials held liable in an action for false imprisonment.[43]

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[35] *See, e.g.*, G. Cheshire, Private International Law 240–42 (1965).

[36] *See, e.g.*, *Slater* v. *Mexican National R.R. Co.*, 194 U.S. 120 (1904); *Schertenleib* v. *Traum*, 589 F.2d 1156, 1165 (2d Cir. 1978); *Mobil Tankers Co.* v. *Mene Grande Oil Co.*, 363 F.2d 611, 615 (3d Cir.), *cert. denied*, 385 U.S. 945 (1966).

[37] *See generally*, G. Cheshire, Private International Law 240–57 (1965); M. Hancock, Torts in the Conflict of Laws 54–63 (1942); Restatement (Second) of the Conflict of Laws §§ 10, 145 (1969). Of course, this is not an ironclad rule and the government would be free to argue that a suit between a U.S. citizen and his government created a sufficient nexus with the American forum to dictate the application of its tort liability principles. But those principles are unlikely to vary sufficiently to make a difference in the outcome.

[38] Although state law may govern the cause of action, federal courts have applied a uniform federal rule in determining whether the defendant enjoys official immunity. *Barr* v. *Matteo*, 360 U.S. 564, 569–76 (1959). There is no justification for departing from that rule because the cause of action arises under foreign law.

[39] Appellate courts have had divergent views on what forum the Supreme Court had in mind when it alluded to damage actions in *Ker*, 119 U.S. at 444. *Compare Waits* v. *McGowan*, 516 F.2d at 207 n.7 (damage actions in state courts) *with United States ex rel. Lujan* v. *Gengler*, 510 F.2d at 64–65 n.3 (damage actions in foreign courts).

[40] *See* G. Cheshire, Private International Law 602–04 (1965); M. Hancock, Torts in the Conflict of Laws 113–120 (1942); Restatement (Second) of Conflict of Laws §§ 10, 145, 171 (1969).

[41] H. Street, The Law of Torts 114–17, 440 (1976).

[42] 28 U.S.C. § 2674; *see, e.g.*, *Johnson* v. *United States*, 547 F.2d 688, 690 n.5 (D.C. Cir. 1976).

IV. Criminal Liability and the Importance of Asylum State Consent

The importance of asylum state consent is perhaps most dramatically highlighted by the possibility that federal officials may be extraditable to the asylum state for kidnapping.[44] A number of abduction cases, including *Ker*, have discussed this possibility.[45] The only effective safeguard against the diplomatic embarrassment and personal anxiety an extradition request would create is a prior agreement with the asylum state that no extradition request will be made.

In sum, asylum state consent appears pivotal to the success of the operation, both as a matter of litigation and public perception. A formal diplomatic protest would force the Second Circuit to decide whether to divest the district court of its criminal jurisdiction as a result of the international law violation. It would make an immunity claim in any civil action difficult to maintain as well as provide the fugitive with a strong argument that the operation violated his Fourth Amendment rights. It would present the possibility of an embarrassing extradition request. Finally, in the current international climate, this country can ill afford an operation that would permit others to argue that the United States does not respect international law. We advise that you not authorize the operation without the asylum state's tacit consent.

V. Miscellaneous Considerations

If an apprehension is to be made, we recommend that it be made in the same manner as any professional arrest: with expedition, minimum restraint, and with full sensitivity to the fugitive's physical needs and constitutional rights. We would recommend that the fugitive be informed of his rights and the presence of outstanding warrants immediately upon his apprehension in the the asylum state and again immediately within the territorial confines of the United States. Even if the fugitive waives his rights, we recommend that there be no attempt at interrogation until the fugitive is within the territorial limits of the United States.

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[43] Torts Branch Monograph, Damage Suits Against Federal Officials, Department of Justice Representation, Immunity 10–11 (Nov. 1978).

[44] Art. 3, para. 7 of the extradition treaty between the United States and the asylum state lists kidnapping and false imprisonment as extradition offenses. The penal code of the asylum state provides:

> A person is guilty of kidnapping—
>
> (1) who unlawfully imprisons any person, and takes him out of the jurisdiction of the court, without his consent; or
>
> (2) who unlawfully imprisons any person within the jurisdiction of the court, in such a manner as to prevent him from applying to a court for his release or from discovering to any other person the place where he is imprisoned, or in such a manner as to prevent any person entitled to have access to him from discovering the place where he is imprisoned.

[45] *E.g.*, *Lujan*, 510 F.2d at 64–65 n.3; *Villareal* v. *Hammond*, 74 F.2d 503, 505–06 (5th Cir. 1934); *Collier* v. *Vaccaro*, 51 F.2d 17, 20–21 (4th Cir. 1931).

As far as the participation of asylum state nationals is concerned, we make the following observations: Insofar as foreign nationals are acting at the behest or direction of this government, they will be regarded as American agents by the courts. If they take action outside the ambit of that agency relationship, *e.g.*, resort to torture, this government may successfully maintain that it was not a party to that action.[46] But this does not militate in favor of using asylum state nationals because FBI agents are not likely to engage in improper conduct in the first place. We think that the use of foreign nationals raises more questions of strategy than of law. Only if foreign nationals, without U.S. direction or compensation, deposited the fugitive on American soil would the legal problems in this memorandum be obviated by their presence.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

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[46] *E.g., Lira*, 515 F.2d at 70–71.

Applicability of Anti-Lottery Laws to Simultaneous Oil and Gas Leasing Procedures

The United States and its officers are not generally exempt from the anti-lottery laws, 18 U.S.C. §§ 1302 and 1304.

Although the question is not free from doubt, the legislative history and judicial construction of the anti-lottery statutes lead to the conclusion that those statutes are aimed at lotteries designed to enrich their promoters at the expense of the gambling public, and therefore do not extend to "lotteries" structured not to enrich federal coffers but for the sole purpose of distributing public leases fairly and efficiently.

Long-standing congressional acquiescence in the Interior Department's Simultaneous Oil and Gas Leasing Procedures is a factor that must be considered in determining whether those procedures constitute an illegal lottery under §§ 1302 and 1304.

April 7, 1980

MEMORANDUM OPINION FOR THE SOLICITOR OF THE INTERIOR

This responds to your request for our opinion as to the applicability of the anti-lottery laws, 18 U.S.C. §§ 1302, 1304, to the Department of the Interior's Simultaneous Oil and Gas (SOG) Leasing Procedures. In our view, although the question is a close one, the SOG leasing program is not a "lottery" within the scope of §§ 1302 and 1304.

The SOG program is administered by the Department of the Interior pursuant to 30 U.S.C § 226(c), which provides that public lands not within any known geologic structure of a producing oil or gas field (commonly called "wildcat" lands) are subject to leasing to the first qualified person making application for a lease.[1] These leases are termed "noncompetitive" because the successful applicants obtain the leases without competitive bidding. Most federal oil and gas leases are obtained through noncompetitive leasing procedures.

To eliminate the chaos that sometimes resulted from competition among applicants seeking to be the "first qualified person making application," the Department of the Interior in 1960 promulgated a regulation providing that all applications received by a specified filing deadline would be considered to have been submitted simultaneously.[2] If more than one qualifying application is received for a given tract, the priority of filing is determined by a public drawing.[3] To be considered, the entry card must be completed, signed, and accompanied by a filing fee of $10.00.[4] An applicant is permitted to file only one entry card for each parcel on the list, though there appears to be no bar to an applicant's filing on as many parcels as he or she wishes.[5] After the drawing is held, unsuccessful applicants are notified by the return of their entry cards in the mail.[6] The first qualified drawee is issued the lease upon payment of the first year's rental of $1.00 per acre. Tract sizes range from under 40 acres to a maximum of 2,560 acres. This procedure is often referred to as the government oil and gas "lottery."[7]

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[1] Section 226(c) of title 30 reads as follows:

> If the lands to be leased are not within any known geological structure of a producing oil or gas field, the person first making application for the lease who is qualified to hold a lease under this chapter shall be entitled to a lease of such lands without competitive bidding. Such leases shall be conditioned upon the payment by the lessee of a royalty of 12½ per centum in amount or value of the production removed or sold from the lease.

The regulation was challenged in *Thor-Westcliffe Development, Inc.* v. *Udall,* 314 F.2d 257, 258 (D.C. Cir.) *cert. denied,* 373 U.S. 951 (1963). The plaintiff argued that in providing for simultaneous filings, the regulation was unresponsive to the statutory command that the lease be given to the "person first making application." The court upheld the regulation after finding that, considering the language and purpose of the statute, as well as the experience of the Secretary in implementing it, the regulation was neither unreasonable nor inconsistent with the plain language of the statute. *Id.* at 260. The court explained:

> It must be owned that the procedure outlined in [the regulation], on superficial examination, bears little resemblance to the "person first making application" language of the statute. But Congress could hardly have supposed that granting $.50 per acre mineral leases can be accomplished as simply as the statutory language seems to indicate. . . . It is the Secretary's job to manage the crowd while complying with the requirement of the Act. [The regulation] is the Secretary's effort in this direction. We cannot say that it is an impermissible implementation of the statutory purpose.

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[2] The regulation, 43 C.F.R. § 3112.2-1, provides:

> On the third Monday of each month, or the first working day thereafter, if the proper office is not officially open on the third Monday, there will be posted on the bulletin board in each proper office a list of the lands in leases which expired, were cancelled, were relinquished in whole or in part, or which terminated, together with a notice stating that such lands will become subject to the simultaneous filings of lease offers, from the time of such posting until 10 a.m. on the fifth working day thereafter. . . .

[3] 43 C.F.R. § 3112.2-1(a)(3).

[4] 43 C.F.R. § 3112.2-1(a).

[5] 43 C.F.R. § 3112.2-1(a)(2).

[6] 43 C.F.R. § 3112.2-1(4).

[7] *See* Nagdeman, *Land-Office Business; Public Participation in Oil Lease Lotteries Is Mounting Fast,* Barron's Feb. 14, 1977, at 11.

Id. Other cases have ruled on questions involving the simultaneous leasing procedure without discussing its legality.[8]

The question posed here is whether the drawing process constitutes a lottery within the scope of 18 U.S.C. §§ 1302 [9] and 1304.[10] By these enactments, Congress sought to curb both legal and illegal lotteries. *See* 4 Cong. Rec. 4061–64 (1876); 120 Cong. Rec. 41,827–29 (1974). We do not believe that the United States and its officers are generally exempted from the operation of these sections. *See generally Nardone* v. *United States,* 302 U.S. 379, 383–84 (1937); *United States* v. *Arizona,* 295 U.S. 174, 183–84 (1935).[11]

Both the Federal Communications Commission (FCC) and the Postal Service have received inquiries concerning this issue. In response to one such inquiry, the Postal Service wrote:

> As we have noted in response to occasional inquiries which we have received, we do not believe that Congress intended to include that type of activity by a federal agency within Section 1302's prohibitions. However, we would not purport to "determine" the applicablity of Section 1302, which is a criminal statute administered by the Department of Justice.[12]

The FCC staff expressed the view that § 1304 and FCC rules pursuant thereto [13] apply to the leasing program. A letter dated May 3, 1979, from the Chief, Complaints and Compliance Division, Broadcast Bureau, FCC, to a law firm, quoted from a December 16, 1976 FCC staff letter to an inquirer as follows:

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[8] *See, e.g., Udall* v. *Tallman,* 380 U.S. 1, 3 n.1 (1965); *Ballard E. Spencer Trust, Inc.* v. *Morton,* 544 F.2d 1067 (10th Cir. 1976); *Burglin* v. *Morton,* 527 F.2d 486 (9th Cir. 1975), *cert. denied,* 425 U.S. 973 (1976).

[9] Section 1302 provides:

> Whoever knowingly deposits in the mail, or sends or delivers by mail:
>
> Any letter, package, postal card, or circular concerning any lottery, gift enterprise, or similar scheme offering prizes dependent in whole or in part upon lot or chance; . . .
>
> Any check, draft, bill, money, postal note, or money order, for the purchase of any ticket or part thereof, or of any share or chance in any such lottery, gift enterprise, or scheme;
>
> Any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery, gift enterprise, or scheme of any kind offering prizes dependent in whole or in part upon lot or chance, or containing any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes; . . .
>
> Shall be fined not more than $1,000 or imprisoned not more than two years, or both; and for any subsequent offense shall be imprisoned not more than five years.

[10] Section 1304 provides:

> Whoever broadcasts by means of any radio station for which a license is required by any law of the United States, or whoever, operating any such station, knowingly permits the broadcasting of, any advertisement of or information concerning any lottery, gift enterprise, or similar scheme, offering prizes dependent in whole or in part upon lot or chance, or any list of the prizes drawn or awarded by means of any such lottery, gift enterprise, or scheme, whether said list contains any part or all of such prizes, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

[11] Generally, if acting in good faith and within the scope of their authority, federal officials are not subject to criminal liability for official acts. *See Clifton* v. *Cox,* 549 F.2d 722, 727 (9th Cir. 1977).

[12] Letter from George Davis, Assistant General Counsel, Consumer Protection Office, United States Postal Service, to Herbert Miller, Koteen & Burt (March 5, 1979).

[13] 47 C.F.R. § 73.1211.

> Based upon precedent developed in the application of the foregoing statutes [18 U.S.C. § 1304 and 503(b)(1)] it is our opinion that the method used by the Bureau of Land Management constitutes a lottery.[14]

The term "lottery" is not defined statutorily. The Supreme Court identified the elements of a "lottery" in the context of §§ 1302 and 1304 in *FCC* v. *American Broadcasting Co.*, 347 U.S. 284 (1954). The American Broadcasting Company was broadcasting advertisements for "give-away" programs which the FCC determined were lotteries, the broadcasting of which was prohibited by § 1304 and the FCC rules adopted pursuant thereto.[15] Finding the legislative history of the sections "unilluminating," the Court looked for guidance primarily to judicial and administrative decisions construing comparable anti-lottery legislation. *Id.* at 291–92. It wrote that there are three essential elements of a "lottery, gift enterprise, or similar scheme": (1) the distribution of prizes; (2) according to chance; (3) for a consideration. *Id.* at 290. In the "give-away" program considered in *American Broadcasting*, listeners selected on the basis of chance at home or in studio audiences received prizes as awards for correctly solving a given problem. Contestants were not required to purchase a product, pay an admission price or visit the promoter's place of business to be eligible to win. The Court stated:

> . . . So varied have been the techniques used by promoters to conceal the joint factors of price, chance, and consideration, and so clever have they been in applying these techniques to feigned as well as legitimate business activities, that it has often been difficult to apply the decision of one case to the facts of another.
>
> . . . The courts have defined consideration in various ways, but so far as we are aware none has ever held that a contestant's listening at home to a radio or television program satisfies the consideration requirement. . . .
>
> We believe that it would be stretching the statute to the breaking point to give it an interpretation that would make such programs a crime. Particularly is this true when through the years the Post Office Department and

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[14] The citation to "503(b)(1)" refers to 47 U.S.C. § 503(b)(1)(D), which provides:

> (b) Any person who is determined by the Commission . . . to have—
>
> * * * * *
>
> (D) violated any provision of section 1304 . . . of Title 18;
>
> shall be liable to the United States for a forfeiture penalty.

[15] 47 C.F.R. § 73.1211.

> the Department of Justice have consistently given the words "lottery, gift enterprise, or similar scheme" a contrary administrative interpretation.

Id. at 293–94. This decision was carried another step in *Caples Co.* v. *United States*, 243 F.2d 232 (D.C. Cir. 1957), in which the court ruled that there was no consideration, and thus no lottery, in a television give-away program even though the program did require participants to visit stores handling the sponsor's products.

If measured by the three-element definition identified by the Supreme Court in *American Broadcasting*, it would seem that the SOG program is a lottery. There is a distribution of "prizes." "Prize" in lottery contexts has been defined as a "thing of value" (*State* v. *Wassick*, 156 W. Va. 128, 191 S.E.2d 283 (1972)), and as "something offered or striven for in a contest of chance—something which may be won by chance" (*State* v. *Pinball Machines*, 404 P.2d 923, 926 (Alaska 1965)). A lease awarded by the drawing system grants the lessee the exclusive right to explore and drill for, extract, and dispose of oil and gas deposits (except helium gas) that may be found in the leased lands. These leases are issued for a 10-year term and so long thereafter as oil or gas is produced in paying quantities. The lessee is required to pay an annual rental fee, but the potential value of the lease in most cases far exceeds the fee paid.[16] Although wildcat lands may have no oil or gas deposits, the leases are "prizes" in that they provide the lessees an opportunity to realize substantial profits by selling the leases to a company capable of conducting the drilling operations, or by themselves conduct drilling operations with the hope of reaping even greater profits. It is suggested that the prize element is lacking because the Secretary is not bound to grant the lease to the person whose card is first drawn. We fail to see how this affects the presence of the prize element, in that the program is based on the assumption that the lease will be awarded. The regulations provide that a "lease *will be issued* to the first drawee qualified to receive a lease upon payment of the first year's rental." 43 C.F.R. § 3112.4–1 (emphasis added).

The second element is "chance." Because the "winner" is determined by a public drawing, chance undeniably is part of the program.

The final element is consideration. Standard rules of contract law hold that consideration is either benefit to the promisor or detriment to the promisee. Corbin on Contracts, § 121 (1963). Money paid for the opportunity to participate, of course, generally would qualify as consideration. It could be argued that the term "consideration" as applied to a lottery requires that some financial benefit be sought by the operator of the lottery. The "classic" lottery involves a scheme in which tickets are sold by persons who look to the advance cash payments as a source of profit. According to the Department of the Interior, the filing fee is designed to cover only administrative costs; it does not go into a pool from which prizes are paid. In our opinion, however, this interpretation impermissibly stretches the term "consideration." Consideration is not determined by examining the purposes for which the money is collected. *See generally Dabbs* v. *International Minerals & Chemical Corp.*, 339 F. Supp. 654, 664 (N.D. Miss. 1972), *aff'd*, 474 F.2d 1344 (1973), *AMP Inc.,* v. *United States*, 389 F.2d 448, 454 (Ct. Cl.), *cert. denied*, 391 U.S. 964 (1968).

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[16] In one reported case, a retired stockbroker sold his lease to an oil company for a net profit of approximately $142,000. *A Monthly Oil Lease Raffle At $10.00 A Shot*, N.Y. Times, January 1, 1978, § 3, at 3, col. 1. In another, a successful applicant netted approximately $69,000, plus a 4 percent share of production payments should oil or gas be discovered on the land. Nagdeman, *supra*, note 7.

Although the SOG program appears to satisfy the three-element definition of "lottery" set forth in *American Broadcasting*, we nevertheless believe that §§ 1302 and 1304 should not be construed to cover the SOG program. The question is difficult, however, and any conclusion cannot be free from doubt. We rest our conclusion on the legislative history of the statutes, judicial approval of this and similar programs, and long-standing congressional acquiescence.

We note at the outset that the anti-lottery sections are penal statutes and therefore must be strictly construed. *United States* v. *Resnick*, 299 U.S. 207, 209 (1936); *United States* v. *Hartwell*, 6 Wall. 385, 395 (1867). General descriptions of classes of persons made subject to a criminal statute should be limited where literal application of the statute would lead to extreme results, and where the legislative purpose would be satisfied by a more limited application. *United States* v. *Katz*, 271 U.S. 354, 362 (1926); *United States* v. *Palmer*, 3 Wheat. 610, 631 (1818). *See also, FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 731–32 (1973). In *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 542 (1943), the Court emphasized that criminal statutes must be given "careful scrutiny lest those be brought within its reach who are not clearly included. . . ." After carefully reviewing the anti-lottery statutes, we conclude, on balance, that the statutes do not clearly include "lotteries" structured by government officials for the sole purpose of awarding public leases, and that the legislative purpose of the statutes is satisfied by this interpretation.

The legislative history of the first federal anti-lottery statutes, albeit scant, reveals congressional intent to suppress often fraudulent schemes to make money by means of lotteries. The first statute prohibiting use of the mails to promote lotteries was passed in 1872. Act of June 8, 1872, 17 Stat. 302. It read:

> That it shall not be lawful to convey by mail, nor to deposit in a post-office to be sent by mail, any letters or circulars concerning illegal lotteries, so-called gift-concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and

> defraud the public for the purpose of obtaining money under false pretences, and a penalty of not more than five hundred dollars nor less than one hundred dollars, with costs of prosecution, is hereby imposed upon conviction, in any Federal court, of the violation of this section.

In 1876, this statute was amended by deletion of the word "illegal" before "lotteries," thus including even those lotteries declared legal under state law. Act of July 12, 1876, 19 Stat. 90. It is clear from the Senate debate of the amendment that the intent was to limit use of the mail for all lottery purposes. 4 Cong. Rec. 4262–64 (1876). One Senator pointed out that a lottery "fosters and encourages gambling and vice . . . ruining many of the poorer portions of the community." *Id.* at 4262–63. Other Senators opined that lotteries were "demoralizing" and "immoral." *Id.*[17] A definition of the term "lottery" appears neither in the statute nor in the legislative history, but it is apparent from the content of the debate that the type of lottery at which the statute was aimed was a lottery designed to enrich its promoters at the expense of the gambling public.[18] You have informed us that the SOG program is designed not to enrich federal coffers, but to distribute the leases fairly and efficiently. In addition, the SOG program differs from a traditional lottery in that an individual may make only one application per lease, thus minimizing the risk of "encouraging gambling."

As noted above, the program has been judicially approved as a proper administrative interpretation of the enabling statute, 30 U.S.C. § 226(c). *Thor-Westcliffe Development, Inc.* v. *Udall, supra.*[19] Other courts have approved selection by lot when the number of qualified applicants for government licenses or other benefits far exceeds the available number of such perquisites. *See Holmes* v. *New York City Housing Authority,* 398 F.2d 262, 265 (2d Cir. 1968) (admission of tenants to low-rent public housing projects); *Hornsby* v. *Allen,* 330 F.2d 55, 56 (5th Cir. 1964) (distribution of liquor licenses).[20] In *Hornsby,* the court held: "If there are more applicants than licenses and all applicants are equally qualified to serve the general welfare, perhaps an unlikely event, then selection among them by lot or on the basis of the chronological order of application would meet constitutional requirements." *Id.* In none of these cases was the program in question challenged as a lottery within the meaning of §§ 1302 and 1304. Nonetheless, judicial approval of these programs provides persuasive authority for the position that, absent an indication to the contrary, selection by lot of government grantees or licensees should not be considered a lottery within the scope of those sections.

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[17] The prohibition against broadcasting information concerning lotteries was added by the Communications Act of 1934, 48 Stat. 1088. The brief references to this section in the committee reports provide no guidance as to the scope of the section. *See* S. Rep. No. 781, 73d Cong., 2d Sess. 8 (1934); H.R. Rep. No. 1918, 73d Cong., 2d Sess. 49 (1934).

[18] In a different context, approximately twenty years after enactment of this statute, the Attorney General defined a "lottery" as "an event which is merely contrived for the occasion." 21 Op. Att'y Gen. 313, 317 (1896). The question arose in the context of a Postmaster General's request for the Attorney General's opinion whether certain schemes of bond and investment companies were within the scope of the statute. The Attorney General concluded that the schemes were in the nature of the lottery covered by the statute, a predecessor of §§ 1302 and 1304. The SOG program, on the other hand, is not merely contrived for the occasion. It is a means of awarding the leases in a nondiscriminatory manner.

[19] Application of the penal anti-lottery statutes to the judicially approved and presumably statutorily authorized program would contravene the general rule that, where possible, statutes are to be construed harmoniously. *See generally Hyrup* v. *Kleppe,* 406 F. Supp. 214, 217 (D. Colo. 1976); Sutherland, Statutory Construction § 53.01 (4th Ed. 1973 and Supp. 1979).

[20] In neither *Holmes* nor *Hornsby* was there any indication that the application had to be accompanied by a filing fee.

Congressional attention has focused generally on the oil and gas simultaneous leasing program at various times since its inception in 1960.[21] Although the SOG program has been labeled by some Members of Congress as a "lottery" or "gamble,"[22] it does not appear that attention has focused specifically on the issue of the legality of the lottery. Despite repeated congressional review of the program, however, the structure of the system remains unchanged. Although legislative inaction alone generally is insufficient evidence of congressional ratification, tacit acceptance of an administrative interpretation is a factor that must be considered when there is evidence that the administrative interpretation has been called to the attention of Congress. *See Blau* v. *Lehman*, 368 U.S. 403, 412–13 (1962); *United States* v. *Midwest Oil Co.*, 236 U.S. 459, 481; Sutherland, Statutory Construction § 49.10 (1973 and Supp. 1978).

In sum, we conclude that §§ 1302 and 1304 should not be construed to prohibit operation of the program. We again caution, however, that the issue is a close one and that persuasive arguments can reasonably be made on the other side. We note that the SOG program, as it now is administered, is not required by the enabling statute and that it may indirectly engender the type of activity at which the anti-lottery laws were aimed. Under these circumstances, you may wish to consider requesting specific congressional authorization for the program.

LEON ULMAN
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Office of Legal Counsel

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[21] *See, e.g., Bureau of Land Management Quadriennial Authorizations For Fiscal Years 1979–82: Hearings on S. 2234 Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 2d Sess. 150–52 (1978); *Bureau of Land Management Budget Request: Hearings Before the Interior Subcomm. of the House Appropriations Comm.*, 95th Cong., 2d Sess. 533–40 (1978); *Mineral Development on Federal Lands: Hearings on S. 1040 Before the Subcomm. on Minerals, Material, and Fuels of the Senate Comm. on Interior and Insular Affairs*, 93d Cong., 2d Sess. 2 (1974); *Federal Leasing and Disposal Policies: Hearings on S.R. 45 Before the Senate Comm. on Interior and Insular Affairs*, 92d Cong., 2d Sess. 23, 86 (1972); *Establishment of a National Mining and Minerals Policy: Hearings on S. 719 Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs*, 91st Cong., 2d Sess. 93 (1970); *Reinstatement of Oil and Gas Leases: Hearings on H.R. 7915 and H.R. 7940 Before the Subcomm. on Mines and Mining of the House Comm. on Interior and Insular Affairs*, 90th Cong., 1st Sess. 27 (1967).

[22] *See, e.g., Department of the Interior and Related Agencies Appropriations for 1979, Part 6, Hearings before the Subcomm. on Interior Appropriations of the House Comm. on Appropriations*, 95th Cong., 2d Sess. 533–40 (1978).

Supersession by the Ethics in Government Act of Other Financial Disclosure Requirements

Section 207(c) of the Ethics in Government Act has superseded the public financial reporting requirements of four environmental laws adopted before its passage.

April 11, 1980

MEMORANDUM OPINION FOR THE DEPUTY GENERAL COUNSEL, ENVIRONMENTAL PROTECTION AGENCY

This is in response to your request for our opinion on the question whether § 207(c) of the Ethics in Government Act (Ethics Act), 5 U.S.C. App., has eliminated the public financial reporting requirements of the following statutory provisions: § 26(e) of the Toxic Substances Control Act, 15 U.S.C. 2625(e); § 1007 of the Solid Waste Disposal Act, 42 U.S.C. § 6906; § 318 of the Clean Air Act, 42 U.S.C. § 7618, and § 12 of the Environmental Research, Development and Demonstration Authorization Act of 1978, P.L. 95–155, 91 Stat. 1263. These statutory requirements are substantially similar in their language and effect, and all were adopted by Congress before the passage of the Ethics Act. They oblige policymaking officials who work in their respective areas of application to report certain personal financial interests for public disclosure and they authorize criminal prosecution for a failure to comply.

Section 207(c) of the Ethics Act reads as follows in pertinent part:

> The provisions of this title requiring the reporting of information shall supersede any general requirement under any other provision of law or regulation with respect to the reporting of information required for purposes of preventing conflicts of interest or apparent conflicts of interest.

For the reasons advanced below, we have concluded that § 207(c) has displaced the four cited provisions of law and brought the provisions of Title II of the Ethics Act into play in their stead.

The language of § 207(c) lays down only two prerequisites for the supersession by Title II of a statutory or regulatory reporting requirement. The first is that a "general" requirement must be involved and the second is that the requirement be aimed at real or apparent conflicts of interest. Applying these prerequisites in reverse order, we first join in your conclusion, derived in part from legislative history, that the subject statutory provisions were indeed intended to prevent conflicts of interest. As for the other prerequisite, since each statutory reporting provision is applicable to the occupants of positions in your Agency that are categorized by the provision in general terms (§ 26(e) of the Toxic Substances Control Act is also applicable in the Department of Health, Education and Welfare), each in our opinion is unquestionably a general requirement within the meaning of § 207(c). *Cf.* H.R. Rep. No. 95-642, Part 1, 95th Cong., 1st Sess., p. 51 (1977), where the Committee on Post Office and Civil Service cited the financial reporting system created for employees of the Department of Energy by P.L. 95-91, §§ 603 and 604, 42 U.S.C. §§ 7213 and 7214, as an example of a requirement intended for supersession by what is now § 207(c) of the Ethics Act.

It should be noted also that our answer to your inquiry is strongly supported by the obvious congressional purpose of establishing uniform financial reporting requirements and procedures throughout the Executive Branch by means of § 207(c).

To repeat, we are of the opinion that § 207(c) has made a dead letter of the four financial reporting enactments you called to our attention and has made Title II of the Ethics Act operative in their stead.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

The President's Authority to Control the Export of Hazardous Substances

The Export Administration Act of 1979 continued the President's authority under its predecessor statute to control exports of hazardous substances for foreign policy purposes.

The statutory criteria for a decision to impose export controls set forth in § 6(e) of the 1979 Act are not binding on the President, although he must specify his conclusions with respect to these criteria in a report to Congress.

Certain statutes imposing conditions on the export of specific hazardous substances may foreclose or limit presidential discretion to take some actions under the 1979 Act.

April 11, 1980

MEMORANDUM OPINION FOR THE SPECIAL ASSISTANT TO THE PRESIDENT FOR CONSUMER AFFAIRS

This responds to your request for our opinion whether the Export Administration Act of 1979, Pub. L. No. 96–72, 93 Stat. 503 (1979), 50 U.S.C. App. § 2401 (Supp. III 1979), provides authority for the President to control the export of hazardous substances in pursuit of the foreign policy of the United States. We conclude that the Act does provide such authority. You have also asked whether the President, in exercising such authority, is formally bound by the factors for his consideration that are set forth in § 6 of the 1979 Act. We conclude that he is not.

I. Substantive Authority to Control Exports of Hazardous Substances

In a memorandum dated January 30, 1979, to the Deputy General Counsel of the Department of Commerce, we concluded that the 1979 Act's predecessor statute, the Export Administration Act of 1969, gave the President authority to control exports of hazardous substances for foreign policy purposes. The issue, then, is whether the 1979 Act continued this authority or modified it in any respect.

The Act's operative language for foreign policy controls was left essentially unchanged in 1979. It authorizes the President to "prohibit or curtail the exportation of any goods, technology, or other information . . . to the extent necessary to further significantly the foreign policy of the United States or to fulfill its declared international obligations." Section 6(a)(1) of the 1979 Act, 93 Stat. 503, 513, 50 U.S.C.

App. § 2405(a)(1) (Supp. III 1979). Although the phrase "foreign policy" is not defined in either the 1969 or the 1979 statute, Congress provided some explanatory legislative history in 1979. It did so in the course of separating authority for foreign policy controls from that for national security controls, and providing different criteria and procedures for each. In the House of Representatives, where the separation originated, the report of the Committee on Foreign Affairs explained how these two sources of authority differ:

> The purposes of foreign policy controls are more vague and more diffuse. The purposes can range from changing the human rights policy of another country; to inhibiting another country's capacity to threaten the security of countries friendly to the United States; to associating the United States diplomatically with one group of countries as against another; to disassociating the United States from a repressive regime. Unlike the situation with national security controls, some of these foreign policy purposes may be served by denying exports even where foreign availability exists. (In the hypothetical case frequently mentioned in hearings and markup, the United States would not want to export thumbscrews, even if other countries were doing so.) Since decisions on foreign policy controls are often more political than technical, congressional involvement in those decisions is more appropriate than in the case of national security controls.

H.R. Rep. No. 200, 96th Cong., 1st Sess. 7 (1979) (hereinafter 1979 House Report).

The Report's emphasis on the range of purposes that foreign policy controls may serve suggests strongly that controls on exports of hazardous substances are included. The conference report provides further support in its statement that this authority "encompasses the full range of U.S. foreign policy goals." H.R. Conf. Rep. No. 482, 96th Cong., 1st Sess. 43 (1979).

The 1979 Act provides definitions of the terms "good" and "technology" as used in § 6. These are certainly broad enough to include hazardous substances. Under § 16(3), 50 U.S.C. App. § 2415, "good" is defined to mean "any article, material, supply or manufactured product, including inspection and test equipment, and excluding technical data." 50 U.S.C. App. § 2415. The term "technology" is defined by § 16(4) to mean "the information and know-how that can be used to design, produce, manufacture, utilize, or reconstruct goods, including computer software and technical data." *Id.*

II. Procedure for Imposing Foreign Policy Controls

Procedurally, § 6(e) of the 1979 Act requires that the President "in every possible instance shall consult with the Congress before imposing" foreign policy controls. 93 Stat. 514, 50 U.S.C. App. § 2405(e). Upon imposing the controls, the President must report to Congress, specifying his conclusions with respect to a set of criteria for decisions set forth in § 6(b) of the Act. *Id.* On their face, these criteria are not significantly confining of presidential discretion. For example, the President is to consider the probability that controls will achieve the intended foreign policy purpose in light of such factors as foreign availability of the goods. Moreover, the legislative history is clear that these criteria "are to be taken into consideration, but they are not conditions which must be met." 125 Cong. Rec. 19937 (1979) (Statement of Senator Stevenson on introducing S. 737). The committee reports confirm this interpretation. *See* 1979 House Report at 20 ("Having considered these criteria, the President is not strictly bound by them."); S. Rep. No. 169, 96th Cong., 1st Sess. 8 (1979) (provision "did not establish criteria to be met but factors to be considered, and recognized that the President, having considered them, might find one or more of the factors irrelevant to a decision to impose or remove controls.").

Section 6(e)(2) also requires the President to report any alternative means that were attempted to achieve the purposes of the controls, or his reason for eschewing them, 50 U.S.C. App. § 2405(e)(2); § 4(c) of the Act allows the President to impose foreign policy controls only on a determination that the embargoed goods cannot be replaced through sources outside of the United States, "unless the President determines that adequate evidence has been presented to him demonstrating that the absence of such controls would prove detrimental to the foreign policy or national security of the United States." 50 U.S.C. App. § 2403(c).

III. Conclusion

Thus we conclude that under the Export Administration Act of 1979, the President may control the export of hazardous substances in appropriate circumstances. We would enter one caveat, however. Certain statutes presently impose conditions on the export of hazardous substances, *e.g.*, the Toxic Substances Control Act, 15 U.S.C. § 2611(b)(1), requiring notice to the recipient nation of product risks. It may be that these statutes foreclose presidential discretion to take some actions, for example banning a product that a statute allows to be exported if notice is given. In the absence of a specific proposal, we have not researched such questions, and wish merely to alert you to them.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

Assertion of Jurisdiction by the United States Over Foreign Vessels Seized Pursuant to a Special Arrangement

The United States may structure a Special Arrangement so as to enable it to assert jurisdiction over a vessel seized on behalf of a foreign state, once the foreign state waives its jurisdiction.

Once the United States asserts jurisdiction over a seized vessel, it must comply with the requirements of the Fourth Amendment.

April 15, 1980

MEMORANDUM OPINION FOR THE DEPUTY ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

This responds to your inquiry whether the United States could assert jurisdiction over foreign vessels seized pursuant to a Special Arrangement if the flag state decided not to prosecute the vessel after the United States had seized the boat on behalf of the flag state. We believe that the Special Arrangement may be stuctured so that the United States can assert jurisdiction when the flag state refuses to prosecute. Once the flag state declines to continue to exercise its jurisdiction, the United States can assert jurisdiction, obtain a warrant to search and seize the vessel, and institute forfeiture proceedings.

As we noted in our memorandum to the Deputy Legal Adviser of February 19, 1980* on this general subject, the President is relatively free to negotiate the details of a jurisdictional agreement with a foreign state. *Williams* v. *Rogers*, 449 F.2d 513, 522–523 (8th Cir. 1971), *cert. denied*, 405 U.S. 926 (1972). Jurisdiction under these agreements may be exclusive, concurrent, or a matter of one party having primary jurisdiction which it may then choose to waive. *Holmes* v. *Laird*, 459 F.2d 1211, 1212, 1214 (D.C. Cir. 1972) (jurisdiction reasserted after initial waiver); Art. VII(3)(c), Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, 4 U.S.T. 1792, T.I.A.S. No. 2846 (NATO SOFA); Art. XVII, Administrative Agreement Under Article III of the Security Treaty Between the United States of America and Japan, Feb. 28, 1952, 3 U.S.T. 3342, T.I.A.S. No. 2492 (Administrative Agreement). For example, under the Administrative Agreement with Japan, the United States had "exclusive jurisdiction over all offenses" committed by its soldiers and civilians in Japan. Art. XVII, § 2. However, the United States could waive its jurisdiction at the request of the Japanese government. *Id.*, § 4. "Upon such waiver, Japan may exercise its own jurisdiction." *Id.* Not until the United States waived its jurisdiction, however, could Japan assert its own jurisdiction.

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*NOTE: The text of the February 19, 1980 memorandum appears in this volume at p. 406. Ed.

Similarly, we believe that the United States could enter into an agreement that would preclude assertion of its jurisdiction until the flag state waived its jurisdiction. The agreement could be a two-tier arrangement: first, there would be an initial seizure on behalf of the flag state. While the United States held the ship in custody for the flag state, the Special Arrangement would permit only the flag state to assert jurisdiction. However, if the flag state decided that it did not wish to proceed against the ship, it could decline to continue its jurisdiction. We would recommend that the Special Arrangement include a specific time limit for this period to reduce the likelihood that the ship remains unprocessed for any length of time.

The flag state's primary jurisdiction must be made clear. The Special Arrangement is premised on the flag state's underlying jurisdiction when the United States seizes the ship. The Special Arrangement should state that we would normally expect the flag state to continue to exercise that jurisdiction by assuming custody promptly. However, in order to permit flexibility, the Special Arrangement could include a second tier: assertion of jurisdiction by the United States when—and only when—the flag state renounces its jurisdiction.[1] It should be made clear that the United States does not exercise concurrent jurisdiction under the Special Arrangement. Only when the flag state refuses to exercise its criminal jurisdiction any longer may the United States exercise its own.

The Special Arrangement should state the precise method by which the United States will inform the flag state *and third parties* that it is asserting jurisdiction. Although such detail may not be necessary, *see* Administrative Agreement, *supra*, the danger that a forfeiture proceeding will be dismissed because of improper notice or delay, especially given the courts' willingness to read the statutes narrowly in order to protect innocent owners, is reason enough to use special caution in drafting this Special Arrangement.[2]

When the United States does assert jurisdiction, it should make sure that the formal seizure of the ship is done without violating the Fourth Amendment. Evidence which is obtained in violation of the Fourth

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[1] The Special Arrangement should be drafted to ensure that there is no gap between the renunciation of jurisdiction by the flag state and its assertion by the United States. *See* 33 C.F.R. § 604-8 (1979).

[2] In addition, the more precise the Special Arrangement is, the easier it will be to convince a court that the Executive has considered all the "details" for which it is responsible—including when United States courts should be allowed to review the proceedings.

Amendment may not be relied on to sustain a forfeiture. *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693 (1965).[3] Some courts have permitted a warrantless seizure when there is probable cause to believe the object is subject to forfeiture. *See United States* v. *Pappas,* 600 F.2d 300 (1st Cir. 1979); *United States* v. *Sink,* 586 F.2d 1041, 1048 (5th Cir. 1978); *cert. denied,* 443 U.S. 912 (1979). However, other courts require exigent circumstances. *United States* v. *McCormick,* 502 F.2d 281 (9th Cir. 1974). This might be hard to show if the ship is in the custody of the United States and its crew has been arrested or removed. Although several courts have held that forfeiture statutes do permit summary seizure, the Fifth Circuit is still "determin[ing] the scope" of the forfeiture laws. *Sink, supra,* 586 F.2d at 1048 (5th Cir. 1978).[4] We would recommend that a warrant be obtained for the search and seizure.

The United States may take advantage of a seizure made by anyone on its behalf by adopting the act and proceeding to enforce the forfeiture by legal process. *The Caledonian,* 17 U.S. (4 Wheat.) 100, 103 (1819). *United States* v. *Story,* 294 F. 517 (5th Cir. 1923). However, here the original seizure, even though made by a United States officer, will be on behalf of a foreign nation.[5] Although seizures by citizens on behalf of a state government may be adopted by the federal government, *In re Commercial Investment Trust Corp.,* 31 F.2d 494 (W.D. N.Y. 1929); *United States* v. *One Studebaker Seven-Passenger Sedan,* 4 F.2d 534 (9th Cir. 1925); *United States* v. *Story, supra,* a court might decide that this line of cases is distinguishable. Such adoption might also raise questions as to whether the original seizure was purely on behalf of the flag state—which might lead to renewed questions about whether there was concurrent jurisdiction over the ship.[6]

We recommend that the United States obtain a warrant to seize the ship, using the testimony of the officer who makes the original seizure to establish probable cause.[7] If this is done as promptly as possible after

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[3] The forfeiture may still proceed, however, if it can be proven by untainted evidence. *United States* v. *One (1) 1971 Harley-Davidson Motorcycle,* 508 F.2d 351 (9th Cir. 1974); *United States* v. *One 1976 Cadillac Seville, Vin,* 477 F. Supp. 879 (E.D. Mich. 1979); *Mayo* v. *United States,* 413 F. Supp. 160, 162 (E.D. Ill. 1976).

[4] The First Circuit, which includes the port of Boston within its jurisdiction, has issued conflicting signals on the question whether an unauthorized seizure bars a subsequent forfeiture. After stating that the illegality of the underlying seizure is irrelevant, *Interbartolo* v. *United States,* 303 F.2d 34 (1st Cir. 1962), reaffirming *Strong* v. *United States,* 46 F.2d 257 (1st Cir. 1931), it questioned, without deciding, whether *Interbartolo* was still good law. *United States* v. *One 1972 Chevrolet Nova,* 560 F.2d 464 (1st Cir. 1977); *Berkowitz* v. *United States,* 340 F.2d 168 (1st Cir. 1965). Then in *United States* v. *Pappas,* 600 F.2d 300 (1st Cir. 1979), the Court limited *Berkowitz.* The district courts reflect that confusion. Compare *United States* v. *One 1975 Pontiac LeMans,* 470 F. Supp. 1243, 1247 (D. Mass. 1979) (citing *Interbartolo*), and *United States* v. *F/V Taiyo Maru,* 395 F. Supp. 413 (D. Maine 1975), with *Melendez* v. *Shultz,* 356 F Supp. 1205 (D. Mass. 1973).

[5] We note that the arresting officer should be aware that his original seizure may be the basis of later action by the United States and therefore the subject of scrutiny by American courts.

[6] We would also recommend that the Special Arrangement specifically state that the flag state cannot reassert its jurisdiction at a later date.

[7] Any drugs which are no longer on board should also be seized on behalf of the United States.

the flag state renounces jurisdiction, it should foreclose an argument that the seizure of the ship was improper.

LARRY L. SIMMS
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Office of Legal Counsel

Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations

American Bar Association Disciplinary Rule 7-104 (DR 7-104), which prohibits an attorney from contacting an opposing party without prior consent from the party's attorney, does not apply to federal criminal investigations or to interrogations by FBI agents; accordingly, the Department of Justice is free to analyze the issues presented by DR 7-104 as policy questions.

The only restraints on federal law enforcement activities are those established by the Constitution and existing statutes; moreover, authorized federal investigative practices are exempt from DR 7-104 by its own terms.

Courts have taken the position generally that DR 7-104 applies to all situations in which a defendant has a Sixth Amendment right to counsel, though they have been reluctant to fetter legitimate and traditional activities of law enforcement officials in the investigative stages of a case; moreover, courts have generally held that waiver of one's constitutional right to counsel does not negate the ethical obligation of a government attorney to seek the consent of an opposing party's attorney before initiating communications with the party.

Federal courts have no power to exclude evidence, dismiss an indictment, or reverse a conviction solely on the ground that DR 7-104 was violated.

State bar associations may not, consistent with the Supremacy Clause, impose sanctions on a government attorney who has acted pursuant to his federal law enforcement responsibilities.

April 18, 1980

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

In May 1979, representatives of the Federal Bureau of Investigation (FBI), the U.S. Attorney's Office of the Southern District of New York, and the Department of Justice's Criminal Division and Office of Legal Counsel met to discuss a growing problem confronting FBI agents and federal prosecutors: the impact of American Bar Association (ABA) Disciplinary Rule 7-104 (DR 7-104) on federal criminal investigations. Essentially, the rule prohibits an attorney from contacting an opposing party without prior consent from the party's attorney.[1] If the

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[1] ABA Disciplinary Rule 7-104 provides:

DR 7-104 Communicating With One of Adverse Interest

A. During the course of his representation of a client a lawyer shall not:

1. Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he

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rule is deemed to apply with full force to criminal investigations and to interrogations by FBI agents, it could substantially affect current FBI practices. A literal reading of the rule would prohibit an agent from seeking a waiver of *Miranda* rights from a represented defendant or target without first receiving permission from that person's attorney. It may even condemn the use of volunteered confessions or admissions made without the presence or knowledge of counsel.

This memorandum will examine (1) the current differing positions within the Department regarding the impact of DR 7-104 on criminal investigations; (2) the history and scope of DR 7-104; and (3) the authority of the federal courts and state bar associations to control federal criminal investigations. We conclude that federal law enforcement activities are limited only by relevant constitutional and statutory provisions, and that DR 7-104, by its terms, exempts authorized investigative procedures. We further conclude that courts have no authority to exclude evidence solely on the basis of a violation of DR 7-104, and state bar associations may not, consistent with the Supremacy Clause, impose sanctions on a government attorney who has acted within the scope of his federal responsibilities. Accordingly, the extent to which the Department limits its activities to conform with judicial and bar association interpretations of DR 7-104 is entirely a question of policy. This memorandum is intended to serve as a basis for that policy discussion.

We recommend that a comprehensive Department policy be formulated after this memorandum and the issues discussed herein have been subjected to the fullest examination by all interested components of the Department.

I. Current DOJ Interrogation and Investigation Practice

In January 1978, the FBI Legal Counsel Office made a detailed analysis of the constitutionality of FBI interrogation practices. The then prevailing FBI policy required an agent to give Fifth and Sixth Amendment warnings to, *inter alia,* "any known subject of a Bureau case" and "any other person so strongly suspect that he is now to be interviewed for a confession or admission of his own guilt in the case rather than merely as a possible source of information." The Legal Counsel concluded that, under recent Supreme Court cases, these standards were overbroad. It thus suggested that the policy be changed to require preinterview warnings only when the person: (1) has been arrested or is in custody; (2) will be arrested at the close of the interview; (3) is signifi-

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has the prior consent of the lawyer representing such other party or is authorized by law to do so.

2. Give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interests of his client.

cantly restricted in his freedom of action; or (4) has been formally charged in a pending prosecution and the interview concerns the pending federal charge or a related federal offense. These proposals were adopted.

It is clear that current FBI interrogation policy does not assume DR 7-104 to be applicable to its agents because the FBI does not require that a subject's or defendant's counsel be notified prior to interrogation. The FBI takes the position that such notification would seriously hamper the ability of agents generally to conduct investigations and specifically to elicit confessions or admissions. The problem is apparently particularly acute in large scale organized crime investigations in which targets may be nominally represented by counsel who themselves are suspected of playing a role in the illegal activities.

In an effort to integrate DR 7-104 and current FBI policy, the Legal Counsel's office undertook an exhaustive study of the rule and the relevant constitutional principles.[2] That office concludes that the rule's requirement of notification to counsel should have no application before the initiation of formal criminal proceedings. After formal criminal proceedings have begun, agents should be permitted to interview, without notification of counsel, a person who initiates the contact if there is an adequate showing that the right to counsel is being waived.[3] Interviews should also be permitted: (1) on charges unrelated to those at issue in the formal criminal proceedings; (2) when the facts and circumstances indicate that counsel has an interest beyond the interest of his or her client and the interview does not seek admissions from the defendant; and (3) when the contact is not made for interrogation purposes. Finally, the Legal Counsel would adopt a general exception to the rule that would permit interrogation necessary to advance the investigation of a serious crime if notification of counsel would adversely affect the investigation.

The interpretation of DR 7-104 put forth by the U.S. Attorney's Office for the Southern District of New York would give the rule far more impact in the conduct of criminal investigations. That Office concludes that it is unethical for an FBI agent or an Assistant United States Attorney (AUSA) to interview a subject known to have counsel, even prior to the initiation of formal criminal proceedings. Application of the rule, in this view, depends upon knowledge of representation, not the filing of charges.

The impact of the rule has become a significant issue in the Northern District of California, where James Hewitt, Federal Public Defender, has strongly objected to FBI interviews of defendants without notification to appointed counsel. Pointing to two recent Ninth Circuit opinions,[4] Mr. Hewitt asserts that conduct considered proper by the FBI is condemned by the courts.

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[2] That study has been of major assistance in the preparation of this memorandum.

[3] The FBI would not apply this rule in the Tenth Circuit. *See United States* v. *Thomas*, 474 F.2d 110 (10th Cir.), *cert. denied*, 412 U.S. 932 (1973).

The Public Defender has also communicated his views to Representative Edwards, who has by letter of November 20, 1979 asked the Attorney General to comment on the matter. In light of Mr. Hewitt's objections, the U.S. Attorney's Office for the Northern District of California has proposed a procedure for interviewing represented defendants. The policy would: (1) permit pre-arrest FBI contacts even if the attorney of the interviewee requests the U.S. Attorney to advise the FBI not to interview his client (the U.S. Attorney would advise the attorney to instruct his client not to talk to FBI agents); (2) permit post-arrest interviews on unrelated charges only after approval by the Chief of the Criminal Division; (3) prohibit FBI-initiated post-arrest contacts without prior approval by counsel; and (4) permit defendant-initiated post-arrest interviews (even if counsel tells the FBI not to interview) after approval by the Chief of the Criminal Division of that Office. The FBI has taken issue with this procedure, asserting that it is based on ethical considerations rather than legal requirements. Furthermore, the FBI recommends that any irreconcilable differences between agents and a U.S. Attorney's Office regarding the propriety of interviews be resolved by FBI Headquarters.

In October 1979, based on the Ninth Circuit's decision in *United States* v. *Partin*, 601 F.2d 1000 (9th Cir. 1979), discussed below, the San Francisco Special Agent in Charge (SAC) recommended that a uniform policy be adopted by all FBI offices in that circuit. The policy would attempt to circumvent the ethical problems created by the Ninth Circuit's interpretation of DR 7-104 by disaggregating the prosecution team of agent and AUSA; agents would not inform AUSA's of uncounseled interviews until absolutely necessary. The SAC's assumption is that the AUSA's lack of knowledge of an intended interview would relieve him of any obligation to notify opposing counsel.[5]

The Criminal Division has recently proposed a policy for its attorneys regarding DR 7-104 and criminal investigations. The policy would prohibit an interview with a subject, target or defendant against whom charges are pending without notification to the defendant's attorney. In extraordinary circumstances (undefined), contact could be made with the written approval of the Assistant Attorney General. If opposing counsel is believed to have a conflict of interest, the Department attorney is urged to consider bringing that fact to the attention of the court and seeking the disqualification of opposing counsel. Interviews of defendants on unrelated charges would be permissible only after notification to counsel except in "compelling" circumstances. If the defendant does not wish his attorney to be present, the government attorney should advise the defendant to retain special counsel. In the absence of new counsel, an interview may occur only if the Assistant Attorney General determines that notice to counsel would place a person in physical danger or in danger of serious economic reprisal or if counsel is implicated in the underlying criminal activity. These same procedures would also apply to defendant-initiated interviews if the defendant requests that counsel not be notified.

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[4] *United States* v. *Partin*, 601 F.2d 1000 (9th Cir. 1979), *cert. denied*, 446 U.S. 964 (1980); *United States* v. *Glover*, 596 F.2d 857 (9th Cir.), *cert. denied*, 444 U.S. 860 (1979).

[5] Other FBI and U.S. Attorney's Offices in the Ninth Circuit have responded to the *Partin* decision. The San Diego FBI Office reported to the Director recently that the U.S. Attorney there has taken the position that the FBI is not bound by ABA rules and that so long as the agent does not inform the AUSA, there is no problem with interviews of represented subjects without the attorney's knowledge. The Portland Bureau Office agreed with the San Francisco Office that the AUSA should not be notified in advance of interviews during the investigative stage. The SAC in Las Vegas has advised the Director that *Partin* will not affect the FBI's operations in Nevada. It is the practice of that office not to inform the U.S. Attorney's Office of proposed interviews with represented subjects in the investigative stage. The office's practices apparently were informally approved by a federal district judge in Las Vegas.

The Criminal Division's proposed policy would obligate the government attorney to notify the case agent when he knows an individual to be represented by counsel. If private counsel requests a government attorney not to interview his client, the government attorney should inform the case agent of the restriction on contact. If the government attorney is prohibited from contacting an individual under these guidelines, an agent may not do so.[6]

II. The Constitution and DR 7-104

Whatever interpretation of DR 7-104 the Department adopts, it plainly must abide by the limits that the Fifth and Sixth Amendments to the Constitution establish for Department law enforcement activities. The Supreme Court has held that an individual's Sixth Amendment right to counsel attaches once "judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information or arraignment.'" *Brewer* v. *Williams,* 430 U.S. 387, 398 (1979), *quoting Kirby* v. *Illinois,* 406 U.S. 682, 689 (1972).[7] Once the right to counsel has attached, the government may not elicit incriminating statements from the person unless it has obtained a waiver of his Sixth Amendment right. *Massiah* v. *United States,* 377 U.S. 201 (1964); *Brewer* v. *Williams, supra,* 430 U.S. at 405-06.[8]

It does not appear to be of constitutional significance whether the government elicits incriminating statements through agents who identify themselves, undercover agents, or informants. *See Brewer* v. *Williams, supra,* 430 U.S. at 400; *Wilson* v. *Henderson,* 584 F.2d 1185,

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[6] To the extent the Criminal Division policy would apply DR 7-104 to the investigative stage, it differs fundamentally from the position of the FBI.

[7] While the Sixth Amendment provides no right to counsel in the investigative stage of a criminal proceeding, the Fifth Amendment guarantees a right to counsel during a custodial interrogation of a suspect. *Miranda* v. *Arizona,* 384 U.S. 436 (1966). *See Beckwith* v. *United States,* 425 U.S. 341 (1976).

[8] It has been generally held that such waiver can occur without the presence of counsel. *See, e.g., Coughlan* v. *United States,* 391 F.2d 371 (9th Cir.) *(per curiam), cert. denied,* 393 U.S. 870 (1968).

1191 (2d Cir. 1978), *cert. denied,* 442 U.S. 945 (1979); *United States* v. *Anderson,* 523 F.2d 1192 (5th Cir. 1975). The case law, however, does not define with precision what conduct constitutes interrogation. For example, the Supreme Court has recently heard argument on a case which will resolve a split in the circuits concerning the use of statements made to cellmate-informants who are instructed to listen to the defendant but not to ask questions. *United States* v. *Henry,* Oct. Term 1979, No. 79–121.[*] *Compare Wilson* v. *Henderson, supra,* 584 F.2d at 1190–91.[9]

The Sixth Amendment's limits on post-indictment law enforcement activities are, thus, fairly well-established. The Constitution permits the government to interview represented defendants without prior notice to their counsel, provided that the defendant waives his right to counsel. Generally, no infringement of the Sixth Amendment can occur prior to the initiation of formal judicial proceedings.[10] As discussed below, DR 7–104, as generally interpreted, provides suspects and defendants with protections that the Constitution does not.

III. The "Authorized By Law" Exception to DR 7–104

The FBI Legal Counsel Office maintains that federal law enforcement efforts should be bound only by the Constitution, federal statutes and regulations. It suggests that FBI activities taken pursuant to 28 U.S.C. §533,[11] which are consistent with constitutional principles, come within the exception in DR 7–104 for communications "authorized by law." As recognized by the Legal Counsel, no explicit statute authorizes FBI investigations or the questioning of represented parties.[12] Moreover, numerous cases have scrutinized FBI conduct under the rule and none has suggested that all the FBI's investigatory activities fall within the "authorized by law" exception.

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[*] NOTE: In *United States* v. *Henry,* 447 U.S. 264 (1980), the Supreme Court held that the government's actions in eliciting incriminating information from a defendant through his cellmate violated the defendant's Sixth Amendment right to counsel, and that such information could not be used against him. Ed.

[9] Other conduct may infringe a defendant's Sixth Amendment right to counsel. The government may not use informants or undercover agents to learn defense strategy. *See Weatherford* v. *Bursey,* 429 U.S. 545, 554 (1977) *(dicta); United States* v. *Levy,* 577 F.2d 200 (3d Cir. 1978). *Cf. Black* v. *United States,* 385 U.S. 26 (1966) *(per curiam)* (dismissal of indictment where government overheard conversations between defendant and his counsel through electronic eavesdropping). Nor may government agents give legal advice to represented defendants or attack the competence of their counsel. *E.g., United States* v. *Morrison,* 602 F.2d 529 (3d Cir. 1979).

[10] *Escobedo* v. *Illinois,* 378 U.S. 478 (1964) (post-arrest, pre-indictment interrogation of a person who had requested but was denied counsel violated the Sixth Amendment), has been limited to its facts. *Johnson* v. *New Jersey,* 384 U.S. 719, 733–34 (1966); *Kirby* v. *Illinois,* 406 U.S. 682, 690 (1972).

[11] Section 533 provides:

> The Attorney General may appoint officials—
>
> (1) to detect and prosecute crimes against the United States;
>
> (2) to assist in the protection of the person of the President; and
>
> (3) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.
>
> This section does not limit the authority of departments and agencies to investigate crimes against the United States when investigative jurisdiction has been assigned by law to such departments and agencies.

[12] *Compare Nai Cheng Chen* v. *INS,* 537 F.2d 566, 569 (1st Cir. 1976) (interrogation of alien authorized by 8 U.S.C. §1357(a)(1)).

We believe, however, that the Legal Counsel's position has merit and, if made to a court, would be persuasive. This Office, in examining questions regarding FBI undercover operations under § 533, has adopted the general rule of statutory construction that where a statute imposes a duty, it authorizes by implication all reasonable and necessary means to effectuate such duty. For example, we have opined that FBI hiring of foreign nationals in Mexico is authorized by § 533 since it is in furtherance of legitimate law enforcement activities.[13] Courts, in interpreting statutes which establish a prohibition but except from it activities otherwise authorized by law, have recognized that conduct reasonably in furtherance of the statutory duty is authorized by law. *Chase* v. *United States,* 155 U.S. 489, 502 (1894); *Burns* v. *United States,* 160 F. 631, 634 (2d Cir. 1908). This Office has reached a similar conclusion construing 18 U.S.C. § 648, which prohibits federal officers from depositing public funds in banks "except as specifically allowed by law." We have opined that § 533 constitutes an exception where such deposits were a necessary part of an FBI undercover operation.

Under this reasoning, if FBI interrogations of suspects or defendants do not violate the Constitution and are reasonable and necessary to the proper performance of § 533 responsibilities, they may be deemed "authorized by law" and thus wholly exempt from DR 7-104 by its own terms. A similar conclusion may be reached for interviews by United States Attorneys and their Assistants. Section 547 of Title 28 authorizes U.S. Attorneys to "prosecute for all offenses against the United States." If interviews of suspects and defendants are deemed necessary and proper to the performance of that duty, such conduct should be deemed "authorized by law" and thus beyond the purview of DR 7-104.

The "authorized by law" exception to DR 7-104 would also become relevant if the Department were to promulgate regulations, consistent with the Constitution and existing statutes, authorizing agents and AUSAs to conduct interviews of represented parties. Such regulations would have the force of law, and thus activities conducted thereunder would fall within the exception. We believe that if the regulations issued were comprehensive and justified in terms of their necessity and utility to federal law enforcement, then activities taken in reliance on the regulations would not violate the rule.

We conclude, therefore, that DR 7-104, by its own terms, should not prohibit lawful FBI investigatory practices. The restraints on federal law enforcement activities are those established by the Constitution and existing statutes.[14] Accordingly, the Department appears free to analyze the issues presented by DR 7-104 as policy questions. In order to aid in the resolution of those questions, the remainder of the memorandum will develop the rationale of DR 7-104 and examine current interpretations of the rule by the courts and bar associations.[15]

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[13] This approach has been followed to uphold the activities of law enforcement agencies in the absence of explicit statutory authority. *See, e.g., United States* v. *Krapf,* 285 F.2d 647 (3d Cir. 1961) (fingerprinting).

IV. DR 7-104: Its Origins and Meaning

DR 7-104, which derives from Canon 9 of the old ABA Canons of Professional Ethics, is generally traced to a 19th century maxim that a lawyer should "never enter into any conversation with [his] opponent's client, relative to his claim or [defense], except with the consent, and in the presence of his counsel." [16] The rationale for the rule is not set forth in the Code, but several justifications are apparent. The most obvious is the fear that an attorney can lead an untutored layperson to make a damaging admission or to settle a case for less than its fair value because of the attorney's expertise in legal matters. The opposing attorney's presence may also prevent the client from waiving privileges or from making misstatements and may help settle disputes by channelling them through dispassionate experts. *See* Leubsdorf, *supra,* at 686-88; D.C. Bar Comm. on Legal Ethics Op. No. 80 (1979).[17] One commentator has summed up the rule's purpose as follows:

> DR 7-104 reflects an apparent conviction that, in the interests of legal sportsmanship, a party should not be allowed to further his case by taking advantage of his opponent's naivete to elicit devastating statements or to conclude an ill-advised settlement. The legal system, accordingly, protects a party against himself by ensuring that contacts with opposing attorneys will take place only through the party's own counsel or in his presence.

Note, *supra* note 17, at 1012.

The rule apparently grew out of concerns of attorney overreaching in civil matters. Its applicability to criminal proceedings is not discussed in the Code and is mentioned in only a few state bar association ethical opinions. *See, e.g.,* ABA Informal Op. No. 1373 (1976); Mich. State Bar Ethics Op. No. 202 (1965). The Supreme Court of Washington has held that the rule is binding only in civil cases and was not intended to apply in criminal proceedings. *State* v. *Nicholson,* 463 P.2d 633, 636 (Wash. 1969). It would appear, however, that the rationale of the rule clearly applies in criminal proceedings, perhaps with more force than in the civil context. *See* Broeder, *Wong Sun* v. *United States: A Study in Faith and Hope,* 42 Neb. L. Rev. 483, 599–604 (1963). And federal courts have repeatedly held the rule applicable to the activities of federal prosecutors and their agents. *See, e.g., United States* v. *Partin, supra,* 601 F.2d 1000; *United States* v. *Thomas,* 474 F.2d 110 (10th Cir.), *cert. denied,* 412 U.S. 932 (1973); *United States* v. *Springer,* 460 F.2d 1344, 1354 (7th Cir. 1972), *cert. denied,* 409 U.S. 873 (1972).

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[14] We consider below the separate argument that state bar associations have no authority to regulate federal law enforcement activities.

[15] As will be readily apparent in the discussion below, the federal courts and the state bar associations generally believe that federal law enforcement activities are subject to DR 7-104. Their views, although perhaps not legally tenable, evidence a concern for fairness and the appearance of justice. Thus, while we conclude that DR 7-104 may not technically bind authorized Department law enforcement activities, we believe that the Department should be aware of those activities which have been strenuously condemned by courts and commentators.

[16] 2 D. Hoffman, A Course of Legal Study Addressed to Students and the Profession Generally 771 (2d ed. 1836), *quoted in* Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interests,* 127 U. Pa. L. Rev. 683, 684 n.6 (1979). *See generally* H. Drinker, Legal Ethics 201-03 (1953).

[17] Leubsdorf's analysis of the rule and its rationale leads him to the somewhat cynical conclusion that it was "probably influenced by an improper desire to protect lawyers against their own clients." Leubsdorf, *supra* note 16, at 693. The self-serving aspect of the rule is also identified in *Note: DR 7-104 of the Code of Professional Responsibility Applied to the Government "Party,"* 61 Minn. L. Rev. 1007 (1977).

The Solicitor General's Office, however, has recently taken the position that:

> DR 7–104 appears to have been formulated with civil cases in mind, and it is by no means clear that it should be deemed to have general application to criminal cases, in which contacts between the government and the defendant in the absence of counsel are already to a considerable extent regulated by the rule of *Massiah* v. *United States,* 377 U.S. 201 (1964).

Partin v. *United States, Brief for the United States in Opposition to a Petition for a Writ of Certiorari,* Oct. Term 1979, No. 79–646 (filed December 1979), at 22 n.26. In addition, this Office has, in a series of memoranda addressing ethical considerations in the context of undercover operations, taken the position that the "ABA Code does not purport to deal with the exigencies and ethical requirements of law enforcement activities." Memorandum from Assistant Attorney General Harmon to Acting Deputy Attorney General Ruff, November 9, 1979. This issue will be discussed in Part V(C) of this memorandum; the discussion of the rule that follows should be understood as assuming, *arguendo,* the applicability of the rule to criminal law enforcement procedures.

A. The Scope of the Rule

DR 7–104 purports to prohibit *all* direct contacts of opposing parties without the prior consent of the party's attorney. The American Bar Association's Committee on Ethics and Professional Responsibility has taken the rule so seriously that it has ruled that

> it is not permissible for lawyer A to send a copy of his settlement proposal to lawyer B's client, even though he

> believes that lawyer B is not relaying settlement offers submitted in connection with the litigation in question.

Informal Op. No. 1348 (1975).

The rule's total ban on communications appears inappropriate in many situations, particularly where the interests of the attorney and the client diverge.[18] Thus, a few exceptions to DR 7-104 have been recognized or suggested in state bar association opinions and cases. The Committee on Legal Ethics of the Oregon Bar Association ruled many years ago that

> [i]n spite of the clear language of [DR-7-104], this committee is not prepared to state in general terms that there can be no circumstances which will justify an attorney in communicating directly with the adverse party; but, if there are circumstances which would justify such communications, we suggest that they are quite unusual and that an attorney should refrain from such communication unless it appears that adverse counsel has consented thereto or has himself been guilty of such misconduct as to justify direct communication.

Opinion No. 9 (1938) (cited with apparent approval in *In re Schwabe,* 408 P.2d 922, 924 (Or. 1965) (*per curiam*)).[19]

It may well be that the absolute nature of DR 7-104 belongs to a bygone era. Scholarly works have criticized the underlying paternalistic justifications for the rule. *See generally,* Leubsdorf, *supra* note 16. The D.C. Bar's Committee on Legal Ethics has recently recommended a full-scale re-evaluation of the rule. D.C. Bar Op. No. 80, *supra.* And the ABA commission currently drafting a revision of the Code appears open to considering formal exceptions to the rule for law enforcement purposes.[20] But, as DR 7-104 is currently interpreted, its ban is nearly absolute.

1. The Definition of "Party"

DR 7-104(a) forbids an attorney from contacting an opposing "party" without the prior consent of the lawyer representing "such other party." The use of the term "party" may be significant, particularly since DR 7-104(b), which regulates contacts with unrepresented persons, uses the word "person" rather than "party."

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[18] *See* Alschuler, *The Defense Attorney's Role in Plea Bargaining,* 84 Yale L. J. 1179, 1194–98 (1975) (describing tactics of criminal defense attorneys who make misrepresentations to their clients in order to induce guilty pleas).

[19] *See also Drinker, supra* note 16, at 203.

Other exceptions have been read into DR 7-104. Attorneys may contact some employees of corporate parties who were witnesses to the conduct at issue in the litigation, ABA Formal Op. No. 117 (1934); and, private attorneys may contact some government officials involved in government action which is the basis of a law suit against the government. D.C. Bar Op. No. 80 (1979).

[20] The Reporter for the Commission on Evaluation of Professional Standards has indicated that the Commission would be quite interested in receiving the views of the Department on DR 7-104.

Arguably the term "party" could mean that the rule has application in the civil context once litigation has been brought and in the criminal context once a person becomes a defendant, *i.e.*, after a formal indictment or charge has been filed. However, we doubt that either courts or bar associations would read the rule so narrowly. The rule's salutary purpose—to prevent the overreaching of opposing counsel—would presumably warrant its application in any situation in which the interests of prospective litigants, including the government, become sufficiently adverse. This test would thus appear to be met, at a minimum, where a person's Sixth Amendment right to counsel has been deemed to attach: once "judicial proceedings have been initiated against him—'whether by way of formal charge, preliminary hearing, indictment, information or arraignment.'" *Brewer* v. *Williams, supra,* 430 U.S. at 398, *quoting Kirby* v. *Illinois,* 406 U.S. 682, 689 (1972).

While no bar association has ruled on the scope of DR 7-104 in pre-indictment situations, several opinions make clear that the rule applies in civil matters prior to the filing of a formal law suit. *See, e.g.*, New York City Bar Ass'n Op. No. 101 (1928-29); ABA Informal Op. No. 524 (1962); Note, *supra* note 17, at 1028 (rule should apply to pending litigation or issue likely to lead to litigation). Furthermore, the proposed revision of the Code makes clear that the rule would apply when no litigation is pending. It includes the prohibition on contacts in two separate sections, one dealing with the lawyer as advocate and the other with the lawyer as negotiator. The latter category sets standards for lawyers settling disputes, organizing an enterprise, concluding a contract, negotiating a labor matter, and representing a client before a government regulatory body. *See ABA Commission on Evaluation of Professional Standards, Model rules of Professional Conduct,* rule 3.2(b)(5), 4.2(c)(2) (Draft, Jan. 30, 1980).

The analysis is more complex in the criminal area. Arguably, the purpose of the rule would be served if DR 7-104 were interpreted to apply late in the investigative stage where a person has been identified as a target. At the point that the process shifts from investigatory to accusatory, one of the government's primary interests becomes eliciting incriminating statements from a putative defendant. *Cf. Escobedo* v. *Illinois,* 378 U.S. 478, 492 (1964). Any earlier application of the rule, however, would be likely to impede legitimate investigative activities and thus run counter to the strong public interest in thorough law enforcement.[21] Thus courts have generally adopted the analysis of the early denial-of-counsel cases, suggesting that contacts violate the rule only once the process has shifted from investigatory to accusatory. *See Clifton* v. *United States,* 341 F.2d 649, 652 n.9 (5th Cir. 1965); *Nai Cheng Chen* v. *INS, supra,* 537 F.2d 566 (contrasting questioning by INS agent at immigrant's home with obtaining statements in a criminal case after a formal filing).[22]

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[21] *See Lee* v. *United States,* 322 F.2d 770, 776 (5th Cir. 1963):

> Police must be given considerable latitude in questioning suspects and witnesses when an effort is being made to determine whether there is probable cause to believe that a crime has been committed. But the situation is vastly different after a suspect has been formally indicted for a crime. The urgency disappears.

The applicability of DR 7-104 to pre-indictment situations was extensively considered by the District of Columbia Circuit in *United States* v. *Lemonakis,* 485 F.2d 941 (D.C. Cir. 1973), *cert. denied,* 415 U.S. 989 (1974). That case concerned an investigation by the District of Columbia police of a number of similar Georgetown burglaries. An ex-policeman, involved in the burglary ring, turned himself in at the U.S. Attorney's office and sought immunity. He agreed to have his telephone and face-to-face conversations with other suspects in the investigation recorded, both before and after the suspects had retained lawyers and had been subpoenaed to testify before the grand jury investigating the burglaries. On appeal after conviction, the defendants asserted that the undercover investigation conducted by the police violated their Sixth Amendment rights and constituted unethical conduct. Lemonakis also pointed out that his attorney had expressly informed authorities that he would make no statement before the grand jury. The court rejected the Sixth Amendment claim on the ground that, under the Supreme court precedent, the pre-indictment surveillance was not a "critical stage" in the criminal process to which the right to counsel attached.

The court further found "the actions of the U.S. Attorneys to be consistent with the current ethical standards demanded of the legal profession." 485 F.2d at 955. The court's reasons were three-fold. First, the AUSA's instructions to the informant did not convert the informant into an "alter ego" of the prosecutor, which would raise the danger of the suspect being tricked by a lawyer into giving away his case.[23] Second, the court held that "in the investigatory stage of the case, the contours of the 'subject matter of the representation' by appellants' attorneys, concerning which the code bars 'communication,' were less certain and thus even less susceptible to the damage of 'artful' legal questions the Code provisions appear designed in part to avoid." Third, the court found that the public interest in criminal investigation warranted use of statements made by a wrongdoer to an undercover agent. The court specifically contrasted "the different interests involved in civil matters." *Id.* at 956.

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[22] *See also United States* v. *Turkish,* 470 F. Supp. 903, 910 n.8 (S.D.N.Y. 1978) (where potential conflict of interest exists due to joint representation of subjects of investigation, AUSA should raise question with attorney or with clients directly; although contact with clients should take place in presence of attorney, direct contact with client should "fall within an exception to the prohibition of DR 7-104").

[23] The court distinguished the surveillance in *Massiah* as occurring after indictment.

Because none of the reasons supplied by the court for distinguishing usual applications of DR 7-104 is persuasive under the particular facts of the case,[24] the *Lemonakis* opinion must be viewed as a statement of the inappropriateness of extending the rule into the pre-indictment stage.[25]

The only other case to discuss at length the role of DR 7-104 in investigations is *In re FMC Corp.*, 430 F. Supp. 1108 (S.D. W.Va. 1977). That case involved a joint EPA-U.S. Attorney criminal investigation of a corporation. FMC objected to interviews of its employees by federal investigators without the prior consent of FMC counsel. The question before the court was which of the corporation's officers and employees should be deemed "parties" within the rule so as to require the consent of FMC counsel before the government could interview them. The court held that the procedures adopted by the government met the rule's ethical obligations: federal attorneys and investigators identified themselves and advised the interviewee that he could have an attorney present during the interview and could contact FMC's corporate counsel. *Id.* at 1111.

The court's decision is important for two reasons. First, it assumes that DR 7-104 applies to interviews conducted in the investigatory stages of a criminal case. Second, it recognizes that the ethical obligations of government attorneys could be satisfied with less than absolute compliance with the rule: *i.e.*, the government attorneys and investigators could interview employees without prior notice to FMC counsel. The court specifically noted:

> in exercising [the court's] supervisory power, the canons enjoy great weight in the court's assessment of whether appropriate standards are being observed by lawyers in the course of their practice within the jurisdiction of the court. The canons are themselves the product of experi-

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[24] Clearly, the acts of the informant were directed and sanctioned by the AUSA, and the incriminating evidence obtained was as damaging as that obtained in *Massiah*. The distinction drawn between contact by the AUSA and the informant is also unsatisfactory because DR 7-104 prohibits an attorney from communicating directly with a represented opposing party and from "caus[ing] another to communicate." Moreover, the AUSA was on notice of Lemonakis' representation and of the fact that he did not wish to make a statement to the grand jury. Finally, the subject matter of the attorney's representation—the investigation of the burglaries—was obvious since Lemonakis had been contacted about the investigation and subpoenaed by the grand jury.

[25] It is possible to restrict *Lemonakis* to situations involving undercover surveillance. A footnote in the opinion distinguishes other cases which evidenced "custodial or post-indictment questioning of a criminal suspect" involving "undisguised Government inquiries pressed by official members of the prosecutorial effort at a point in time when their questions would be sharpened by the factual posture of the case against the suspect." *Id.* at 955 n.23. This suggests that the court might have ruled differently had the AUSA, pre-indictment, contacted the suspect directly without notifying counsel. *See United States* v. *Weiss*, 599 F.2d 730, 740 (5th Cir. 1979) (Strike Force attorneys "flirted with" violation of DR 7-104 by approaching represented target just prior to seeking indictment). Other cases have criticized on ethical grounds post-arrest but pre-indictment interviews of represented persons. *See United States* v. *Thomas*, *supra*, 474 F.2d 110; *United States* v. *Howard*, 426 F. Supp. 1067, 1071-72 (W.D.N.Y. 1977). But *Lemonakis*, at the least, recognizes that the public interest in effective law enforcement should, to some extent, limit the rule's applicability in investigative activities.

> ence gained over the decades, even the centuries, and are designed to establish and assure standards of simple fairness and moral and ethical responsibility on the part of counsel in furtherance of the ends of justice.
>
> *Yet, the court must look beyond the canons in order to preserve a reasonable balance between the exaction of ethical conduct from its lawyer members on the one hand and the search for truth in the administration of justice on the other.* *Woods* v. *Covington County Bank*, 537 F.2d 804, 810 (5th Cir. 1976). Especially is this the case where the canons and the disciplinary rules promulgated by the bar thereunder are either vague or altogether lacking.

Id. at 1110 (emphasis added).[26]

In summary, it seems clear that DR 7–104, assuming it applies to criminal matters, logically applies to all situations in which the defendant or putative defendant has a Sixth Amendment right to counsel. The rule also would logically apply once the criminal process has shifted from investigatory to accusatory, *e.g.*, post-arrest, and perhaps even to investigatory interviews of represented targets by government lawyers.[27] However, courts appear reluctant to fetter legitimate and traditional activities of law enforcement officials in the investigative stage of a case; [28] they tend to invoke the public interest in effective investigation to override the literal meaning of the rule.[29]

2. "On the Subject of the Representation"

DR 7–104 prohibits an attorney from contacting an opposing party "on the subject of [his] representation" without the prior consent of the attorney retained by the party "in that matter." This language is important because it appears to permit a broad range of contacts with represented persons, even those who have been indicted. The fact that a person has retained counsel to represent him on one criminal charge would not prohibit interviews concerning unrelated matters.

This view has received general approval by the courts in cases considering a defendant's Sixth Amendment right to counsel: government agents or attorneys may interview persons against whom formal criminal charges are pending if the interview concerns different criminal matters.[80] Under Sixth Amendment analysis, the right to counsel on the charge being investigated will not have attached if there has been no indictment or other initiation of formal proceedings, irrespective of the fact that the person stands indicted on another charge for which he has retained counsel.

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[26] *See also Wyatt* v. *Hardin*, Civ. No. 3195–N (M.D. Ala.), Order of June 21, 1978, permitting government attorneys to tour Alabama State mental institutions and interview all personnel without notice to defense counsel. *But cf.* Note, *supra* note 17, at 1022 n.53.

[27] *See United States* v. *Weiss*, *supra*, 599 F.2d at 740 (Strike Force attorneys "flirted with" violations of Canons of Ethics by approaching target they knew to be represented "when they were about to seek an indictment against him").

[28] *Cf. United States* v. *Massiah*, 307 F.2d 62, 67 (2d Cir. 1962), *rev'd*, 377 U.S. 201 (1964) ("Those who are engaged in the difficult and dangerous business of investigating illegal dealing in narcotics should not be deprived of any reasonable means of securing evidence.")

[29] Of course, these courts do not decide what action a state bar association might take in disciplining an attorney deemed to have violated the rule.

The ethical question has received less attention from the courts. Interviews of indicted defendants on unrelated matters seem permissible under the plain words of the rule; however, at least one court has expressed, *in dicta,* its "unease" with the practice, citing DR 7-104. *United States* v. *Crook,* 502 F.2d 1378, 1380 (3d Cir. 1974), *cert. denied,* 419 U.S. 1123 (1975). Such concern could be based on the inherently coercive atmosphere of in-jail interviews, even on unrelated charges, as well as the potential for interviews to stray toward discussion of the charge for which the person has been indicted.

But we believe the better view is represented by the Second Circuit's opinion in *United States* v. *Masullo,* 489 F.2d 217 (2d Cir. 1973). In that case, the defendant was arrested upon leaving the office of an attorney representing him on a state narcotics charge. Although the agents were aware that Masullo had retained counsel in the state matter, he was interviewed concerning federal charges for which he had not yet been arraigned. The court rejected the defendant's claim that the interview without notice to counsel retained on the state charge violated the Sixth Amendment or the government's ethical obligations. The court held that the right to counsel had not attached on the federal charge, nor had counsel been retained on that charge. The court went on to state:

> The concept that professional criminals have "house counsel" because of prior escapades and that therefore government agents knowing the identity of prior counsel have an obligation of constitutional or even ethical dimension to contact counsel before questioning them is hardly appealing . . . . Those who have no "regular" counsel and no means to retain counsel would seem to be more deserving of our solicitude.

Id. at 223-24.

Separate problems are raised where no criminal charges are pending but a person has let it be known that a particular lawyer handles all his criminal matters; or where a criminal enterprise has designated a particular attorney as lawyer for all of the organization's members. (The latter example raises the possibility that the lawyer may have greater allegiance to the welfare of the enterprise than to the welfare of its members.) No cases or bar association opinions discuss whether the rule requires government attorneys or investigators to seek approval from such "house counsel" prior to contacting possible witnesses, subjects, or targets.

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[80] *See Hoffa* v. *United States,* 385 U.S. 293 (1966) (no unconstitutional denial of counsel where informant hears indicted defendant discussing jury tampering; incriminating statements used in subsequent prosecution and not in the proceeding based on the first indictment); *United States* v. *Dority,* 487 F.2d 846 (6th Cir. 1973); *United States* v. *Osser,* 483 F.2d 727, 733-34 (3d Cir.), *cert. denied,* 414 U.S. 1028 (1973).

We believe the rule could be read not to apply in the early stages of an investigation if the actual charges to be filed are unclear and the persons who may be charged have not designated the attorney to work on any particular charge.[31] Certainly no court would, under existing case law, hold that contacts under these circumstances would violate the Sixth Amendment. It seems obvious to us that extension of DR 7-104 to such situations could severely hamper federal law enforcement.

As the investigation becomes focused on subjects and targets and the nature of the charges becomes clearer, the rule could come into play. If the investigation becomes known because of grand jury proceedings and an attorney has informed the government that his client should not be interviewed, then it may be fairly said that the attorney has been retained for the matter under investigation.[32]

3. "Authorized by Law"

We have discussed above the "authorized by law" exception and our conclusion that federal law enforcement activities taken pursuant to 28 U.S.C. § 533 are exempt from the rule's purview. *See* pages 7-10 *supra.* The "authorized-by-law" exception may also permit contacts if a defendant affirmatively seeks out a government attorney. The Solicitor General has recently taken the position that a defendant's "constitutional right to act on his own behalf in communicating with the government," *Faretta* v. *California,* 422 U.S. 806 (1975), "would be of little value if that official were ethically bound to decline to listen." *Partin* v. *United States, Brief in Opposition, supra,* at 23. Thus, the brief argues, the Constitution authorizes, and may arguably require, the government to listen if the defendant initiates the communication in the absence of his attorney.

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[31] One commentary has reached a similar conclusion in addressing the applicability of DR 7-104 to contacts by private attorneys of government officials. Since government officials are technically at all times represented by government counsel, the rule could be read to prohibit all contacts. The commentator argues that that interpretation is unnecessarily overbroad and that DR 7-104 should come into play only after the government has sought legal assistance on a matter. Until government counsel has been contacted about a particular dispute, the government cannot be said to be represented "in that matter." Note, *supra,* note 17, at 1031-32. *See* D.C. Bar Op. No. 80 (1979) (rule restricts communications with government officials only when subject matter has "been specifically entrusted to a designated" attorney).

[32] The conclusion that, under these circumstances, the communication would be deemed to have concerned the "subject matter of the representation" does not end the discussion of the rule's applicability. As discussed above, courts have held that the public interest in federal law enforcement may take precedence over DR 7-104 in some situations, *see Lemonakis* v. *United States, supra,* 485 F.2d at 956 or, alternatives to the rule may be devised that adequately protect the interests of the client. *See, e.g., In re FMC, supra,* 430 F. Supp. 1108.

B. Waiver of DR 7-104

By its terms, DR 7-104 is an absolute bar against conversations with an opposing party without the consent of the party's attorney (except where communication is authorized by law). Assuming its applicability to criminal and civil law enforcement, the question arises whether the protection of DR 7-104 can be waived. Two types of waiver situations are readily apparent: (1) a government agent or attorney initiates the contact and obtains a waiver of counsel from the opposing party; (2) the defendant affirmatively seeks out a government agent or attorney and indicates that his lawyer should not be present at, or informed of, the meeting. Courts have almost uniformly condemned government-initiated contacts, even though they recognize that a person may waive his constitutional right to counsel. Courts have tended to find no ethical violation occurs where the party initiates the communication.

1. Government-Initiated Contacts

If the government knows that an opposing party has retained an attorney for a pending or imminent criminal charge, the express words of DR 7-104 forbid contact with the party without the consent of the party's attorney. However, law enforcement officials—who are usually not attorneys and often unaware of DR 7-104—commonly seek to interview persons after arraignment or indictment without the presence of counsel. While *Massiah* contains language that arguably condemns all post-indictment interviews without counsel present, most courts of appeals have held that the constitutional right to presence of counsel may be waived. *See, e.g., United States* v. *Rodriguez-Gastelum,* 569 F.2d 482 (9th Cir.) (*en banc*), *cert. denied,* 436 U.S. 919 (1978); *United States* v. *Cobbs,* 481 F.2d 196 (3d Cir. 1973), *cert. denied,* 414 U.S. 980 (1973); *Coughlan* v. *United States, supra,* 391 F.2d at 372 (rejecting claim that Sixth Amendment right to counsel may be waived only with counsel present). *But see United States* v. *Thomas, supra,* 474 F.2d 110.[33] These cases are consistent with and supported by the Supreme Court's decision in *Brewer* v. *Williams, supra.* In *Brewer* the Court found a violation of *Massiah* but stated:

> The Court of Appeals did not hold, nor do we, that under the circumstances of this case Williams *could not,* without

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[33] The courts have generally adopted the *Johnson* v. *Zerbst,* 304 U.S. 458 (1938), waiver standard: a knowing and intelligent relinquishment of a known constitutional right. However, the cases are confused as to whether the waiver of *Miranda* rights constitutes a *Johnson* type waiver of Sixth Amendment rights. The Second Circuit has held that waiver of the right to counsel requires more than the sometimes perfunctory waiver of *Miranda* rights. *See United States* v. *Satterfield,* 558 F.2d 655 (2d Cir. 1976), *aff'g* 417 F. Supp. 293 (S.D.N.Y. 1976) (requiring a *Faretta* type waiver). Justice Blackmun has stated in a concurring opinion that the standard waiver for *Miranda* rights is not adequate for a waiver of the right to counsel, which requires a *Johnson* waiver. *North Carolina* v. *Butler,* 441 U.S. 369, 376–77 (1979) (Blackmun, J., concurring). The majority in that case, however, appeared to equate a *Miranda* waiver with a *Johnson* waiver. 414 U.S. at 374–75.

> notice to counsel, have waived his rights under the Sixth and Fourteenth Amendments. It only held, as do we, that he did not.

430 U.S. at 405–06 (emphasis in original; footnote omitted).[34] *But see Hancock* v. *White,* 378 F.2d 479, 482 (1st Cir. 1967).

But recognition of the ability of a defendant to waive the constitutional right to counsel does not necessarily imply that government officials may, consistent with DR 7–104, affirmatively seek that waiver. Courts have taken the position that if an FBI agent or AUSA initiates the contact, he has acted unethically even if a waiver sufficient for constitutional purposes has been obtained.[35] *See also* ABA Formal Op. 108 (1934) (plaintiff's attorney may not interview defendant absent defendant's counsel even if defendant is willing to discuss facts of the case).

Several courts have objected quite strongly to such conduct. In *United States* v. *Thomas, supra,* 474 F.2d 110, the Tenth Circuit, *in dictum,* indicated that it would apply an exclusionary rule prohibiting the use of any statement obtained in violation of the rule, irrespective of whether the defendant's constitutional rights have been violated:

> [O]nce a criminal defendant has either retained an attorney or had an attorney appointed for him by the court, any statement obtained by interview from such defendant may not be offered in evidence for any purpose unless the accused's attorney was notified of the interview which produced the statement and was given a reasonable opportunity to be present. To hold otherwise, we think, would be to overlook conduct which violated both the letter and the spirit of the canons of ethics. This is obviously not something which the defendant alone can waive.

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[34] A conflict presently exists in the circuits as to whether a defendant who has initially requested the presence of an attorney may thereafter waive his right and be questioned without the aid of an attorney. *Compare United States* v. *Grant,* 549 F.2d 942 (4th Cir.), *cert. denied,* 432 U.S. 908 (1977), *and United States* v. *Tafoya,* 459 F.2d 424, 427 (10th Cir. 1972) *with Nash* v. *Estelle,* 597 F.2d 513, 517 (5th Cir. 1979) (*en banc*), *and White* v. *Finkbeiner,* 570 F.2d 194, 200–201 n.3 (7th Cir. 1978). Courts holding that no subsequent waiver is possible without an attorney present rely upon dicta in *Michigan* v. *Mosley,* 423 U.S. 96, 104 n.10 (1975) (holding that defendant may subsequently waive Fifth Amendment right after an initial refusal to answer questions, but distinguishing situation where defendant initially requests the presence of an attorney). Justice White's concurring opinion in *Mosley* makes a similar distinction. *Id.* at 110. *See generally* Case Note, *Fifth Amendment, Confessions, Self-Incrimination—Does a Request for Counsel Prohibit a Subsequent Waiver of Miranda Prior to the Presence of Counsel?,* 23 Wayne L. Rev. 1321 (1977).

[35] *See United States* v. *Crook, supra,* 502 F.2d at 1380; *United States* v. *Cobbs, supra,* 481 F.2d 196; *United States* v. *Thomas, supra,* 474 F.2d 110; *United States* v. *Four Star,* 428 F.2d 1406, 1407 (9th Cir.) (*per curiam*), *cert. denied,* 400 U.S. 947 (1970); *Wilson* v. *United States,* 398 F.2d 331, 333 (5th Cir. 1968) (*per curiam*), *cert. denied,* 393 U.S. 1069 (1969).

474 F.2d at 112. Other circuits, without indicating an intention to adopt an exclusionary rule, have criticized the practice of seeking waiver. In *United States* v. *Four Star, supra,* the Ninth Circuit stated:

> We emphatically reiterate, . . . that in-custody interrogation of an accused person known to be represented by counsel without affording counsel an opportunity to be present is undesirable . . . , and that a prosecuting attorney who knowingly participates in such an interrogation or takes advantage of its results violates professional ethics.

428 F.2d at 1407.[86]

2. Party-Initiated Contacts

DR 7-104 does not address situations in which persons affirmatively seek out government agents or attorneys. If the rule were read paternalistically—that is, that only lawyers can protect clients from making foolish or damaging statements—then even in those circumstances the government official would be required to contact the party's attorney before communicating with his client.[87] Courts, however, have been reluctant to condemn party-initiated communications, generally upon the ground that such contacts are voluntary, usually non-custodial and unlikely to be coercive. Thus, the dangers that the rule seeks to protect against, such as attorney trickery, are thought to be minimal.

Illustrative of this attitude is *United States* v. *Monti,* 557 F.2d 899 (1st Cir. 1977). The defendant was arrested for counterfeiting, and was arraigned and jailed. He was unable to meet bail. While in jail and after unsuccessfully attempting to retain counsel, he contacted a Secret Service agent and asked him to come to the jail. The agent did so, and after he gave Monti *Miranda* warnings, Monti indicated a desire to cooperate. Monti subsequently had counsel appointed and was released on his own recognizance. Shortly after meeting with his court-appointed counsel, he met with Secret Service agents, who again gave him *Miranda* warnings. Monti made a derogatory comment about his court-appointed lawyer and stated that he was not going to tell his lawyer anything. He then made incriminating statements which were used against him at the trial.

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[86] Courts have been less likely to chastise government-initiated contacts where the party's lawyer may have a conflict of interest in the case. In *United States* v. *Weiss, supra,* 599 F.2d at 730, Weiss had been indicted on state charges of receipt of stolen property and was being investigated for violations of federal firearms law. Weiss attempted to bribe an Atlanta police officer, who was wired by the FBI. Nine days before the federal indictment came down, FBI agents confronted Weiss with tapes and photographs and sought his cooperation. The agents stated that he could consult with his state attorney, but that it might not be in his interest to do so. Weiss subsequently met with a Strike Force attorney. On appeal he sought to enforce an alleged promise not to prosecute and claimed that the government had interfered with his right to counsel. The court rejected both claims. While it stated that the Strike Force attorney "flirted" with violation of DR 7-104, it recited the district court's finding that Weiss' state attorney was a target of the Strike Force investigation and also represented potential witnesses against Weiss; thus an actual conflict of interest existed. Under the circumstances the court did not believe that the government's conduct warranted reversal, particularly where no evidence obtained at the meetings was used at trial.

[87] *See* Michigan Bar Op. No. 202 (1965) (criminal case); ABA Formal Op. 108 (1934) (civil case); *People* v. *Patterson,* 198 N.W. 2d 175, 178-83 (Ct. App. Mich. 1971) (Levin, P.J., dissenting).

The Court of Appeals held that Monti had waived his right to counsel, and then dismissed Monti's DR 7-104 claim as follows:

> Although other courts have commented on the ethical considerations involved in questioning a defendant without counsel present, *United States* v. *Cobbs*, 481 F.2d 196 (3d Cir. 1973), *cert. denied*, 414 U.S. 980 (1973); *United States* v. *Thomas*, 474 F.2d 110 (10th Cir. 1973), *cert. denied*, 412 U.S. 932 (1973), we agree with the District Court that such considerations do not warrant the exclusion of the . . . statements herein. Those statements were not the equivalent of a guilty plea in court. Where, as here, defendant clearly and unequivocally evidenced his desire *not* to have counsel present at a self-initiated, non-custodial meeting, it would have served no useful purpose to have suppressed statements made at that meeting on the ground of counsel's absence.

557 F.2d at 904 (emphasis in original).

Other courts have reached a similar conclusion under various factual situations if the defendant initiated the contact with the government. *See United States* v. *Thomas*, 475 F.2d 115 (10th Cir. 1973); *Reinke* v. *United States*, 405 F.2d 228 (9th Cir. 1968); *United States* v. *Hale*, 397 F.2d 427 (7th Cir. 1968), *cert. denied*, 393 U.S. 1067 (1969) (lawyer told police that defendant wished to cooperate).[38]

At least one court, however, has indicated that even if the government does not initiate the contact, the better practice is not to communicate with a defendant without a lawyer being present. In *United States* v. *Woods*, 544 F.2d 242 (6th Cir. 1976), the wife of one of the defendants in a complex drug conspiracy case arranged a meeting between an agent and her husband to discuss immunity. An AUSA attended the meeting at which the defendant's role in the conspiracy was detailed, but no attempt was made to contact his attorney, who also represented other defendants in the case. The court, per Judge

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[38] *But see United States* v. *Partin*, *supra*, 601 F.2d at 1005 (violation of DR 7-104 where convicted co-defendant seeks out AUSA with offer of cooperation and requests that his cooperation be kept secret out of fear for his physical safety); *United States* v. *Thomas*, *supra*, 474 F.2d at 111 (violation of DR 7-104 even though "not disputed that the interview was requested by appellant and that appellant read and signed a *Miranda* type waiver of rights form"); *Clifton* v. *United States*, *supra*, 341 F.2d at 652 (violation of old Canon 9 to talk with incarcerated arrestee where he is young and unschooled even though he initiated contact with FBI).

McCree, held that the occurrence of the meeting did not constitute reversible error:

> Of course, as a general matter, an attorney should not communicate directly with a party whom he knows to be represented by an attorney without the consent of the lawyer. *See* American Bar Association Code of Professional Responsibility, Canon 7, DR 7-104(a)(1). Here, however, the meeting was arranged primarily between government agents and [defendant's wife], who was not under indictment. The government did not seek the meeting. Government attorney Wampler testified that he believed that [the defendant] particularly wanted to keep his attempts to secure immunity from the other defendants and the counsel who represented them all jointly. *Cf. Arrington* v. *Maxwell,* 409 F.2d 849, 853 (6th Cir. 1969).

544 F.2d at 255. The court went on to state:

> However, the government did not take the precautions that were possible. It did not encourage or even suggest to [the defendant] that he should either notify [his attorney] or arrange for the appointment of independent counsel who could be present. Although we disapprove of this practice, it bears little resemblance to the outrageous prosecutorial conduct which required reversal in cases cited by appellants.

Id. See also Michigan State Bar Op. No. 202 (1965) (where defendant seeks interview and fears notice to counsel, prosecutor should approach the court and ask for instructions).

To summarize, courts have taken the position generally that waiver of one's constitutional right to counsel does not negate the ethical obligation of a government attorney to seek the consent of an opposing party's attorney before initiating communication with the party. If the party initiates the contact and the circumstances demonstrate that his present counsel is either not wanted by the party or may have a conflict of interest, then courts are less likely to characterize the communications as unethical. However, at least one court has suggested that even in the latter situations, the best course of action would be to advise the person to seek new counsel.

C. Disaggregating the Prosecution Team

In response to the *Partin* decision, the San Francisco FBI office has suggested that a uniform FBI policy should be adopted, consistent with the Constitution, under which agents will not inform an AUSA of a proposed contact with a represented person until absolutely necessary. The assumption is that if the AUSA does not know that an agent intends such a communication, the AUSA would not be compelled to notify opposing counsel.

We do not believe that an attempt to disaggregate the prosecutorial team by insulating AUSAs from planned interviews with represented targets or defendants will necessarily protect prosecutions from criticism by the courts. We recognize that some cases have suggested that, whatever the relevance of the Canons of Ethics to the activities of government attorneys, they do not control the conduct of government agents. Usually cited for this proposition is the Second Circuit's opinion in *United States* v. *Massiah,* 307 F.2d 62, 66 (2d Cir. 1962), *rev'd,* 377 U.S. 201 (1964).[39]

Justice White's dissenting opinion in *Massiah* also states that the conduct of the investigators in that case did not violate ethical standards which apply solely to attorneys. He asserted that the purpose of the rule, to protect parties from artful attorneys, is not served by prohibiting a co-defendant, non-lawyer informant from speaking with another defendant without notice to that defendant's attorney. *See also United States* v. *Lemonakis, supra,* 485 F.2d at 956 (government instructions to wired informant did not render informant "alter ego" of U.S. Attorney's office).

Justice White's position may have much to commend it, at least as regards questioning by informants. Courts have, however, refused to view agent contacts as separate from the AUSA's conduct of a case. *See, e.g., Clifton* v. *United States, supra,* 341 F.2d at 652 n.9 (although FBI agents may not be lawyers, once process shifts from investigation to accusation, DR 7–104 applies); *Schantz* v. *Eyman,* 418 F.2d 11 (9th Cir. 1969), *cert. denied,* 397 U.S. 1021 (1970) (district attorney sends psychiatrist to home of defendant who is pleading insanity defense; gross violation of professional ethics); *United States* v. *Howard, supra,* 426 F. Supp. at 1071 (questioning by agent viewed as government conduct violating DR 7–104); *United States* v. *Wedra,* 343 F. Supp. 1183, 1188 (S.D.N.Y. 1972) (Weinfeld, J.) (suppressing testimony based on agent interview that would have violated DR 7–104 if conducted by AUSA).[40] No court has excused an interview of a represented party on the basis that it was conducted by an agent and not an AUSA. *See United States* v. *Brown,* 569 F.2d 236, 249 (5th Cir. 1978) (Simpson, J., dissenting).

This view is supported by interpretations of the Code. *See* ABA Formal Op. No. 95 (1933) (police officers may not, at behest of municipal attorney, obtain statements from personal injury claimants); ABA Informal Op. No. 663 (1963) (unethical for defense attorney to engage undercover investigator to discover physical and mental state of plaintiff in medical malpractice case). It is also supported by the ABA's Preliminary Statement preceding the Canons, which reads:

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[39] However, even that opinion recognizes that DR 7–104 would prohibit "an investigator's acting as the prosecuting attorney's alter ego." 307 F.2d at 66.

[40] *See also Coughlan* v. *United States, supra,* 391 F.2d at 376 (Hamley, J., dissenting):

> While [DR 7–104] does not purport to govern the conduct of non-lawyers, such as the interrogating officers in this case, it does place a responsibility upon prosecuting lawyers not to sanction, or take advantage of, statements obtained by government agents from a person represented by counsel, in the absence of such counsel.

> Obviously the Canons, Ethical, Considerations, and Disciplinary Rules cannot apply to non-lawyers; however, they do define the type of ethical conduct that the public has a right to expect not only of lawyers but also of their non-professional employees and associates in all matters pertaining to professional employment. A lawyer should ultimately be responsible for the conduct of his employees and associates in the course of the professional representation of the client.

Thus, it appears that bar associations may well attempt to hold AUSAs responsible for the conduct of agents involved in a prosecution they are directing.[41]

We believe that disaggregating the AUSA from his investigators has very little to commend it as a matter of policy. First, such an approach is likely to cut down on communications between AUSAs and FBI agents which play a vital role in the investigatory process. Second, we believe that the Attorney General's power to establish ground rules in this area should not be exercised in such a fashion as to create at least the appearance of a "double standard" within the Department of Justice absent some compelling interest in doing so.[42]

V. Sanctions

The preceding discussion assumes that DR 7-104 will be deemed applicable to most situations involving government contact with represented parties in criminal matters. This raises the question of what sanctions could be imposed on the government or a government attorney or agent for violation of the rule. There appear to be three: (1) exclusion of evidence; (2) dismissal of the indictment, or reversal of conviction; and (3) state bar disciplinary proceedings.

A. Exclusion of Evidence

As noted above, the Tenth Circuit announced *in dictum* a prospective exclusionary rule for evidence obtained in violation of DR 7-104 in *United States* v. *Thomas, supra,* 474 F.2d 110. No subsequent opinion from that Circuit has applied the rule, although it has been reaffirmed *in dicta, United States* v. *Lebya,* 504 F.2d 441, 443 (10th Cir. 1974), *cert.*

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[41] As discussed below, a state bar disciplinary proceeding was begun against an AUSA where he did not encourage, direct, or request FBI agents to interview the defendant, although he had been present at a discussion where the possibility of such contact was raised. *In the Matter of Rosen,* Certified Report of Wayne County Hearing Panel #15 of the Attorney Discipline Board, File No. 35019-A (Mich. Attorney Discipline Bd., Dec. 27, 1978).

[42] Such a policy also would not protect FBI agents who are attorneys and members of state bars.

denied, 420 U.S. 934 (1975) and distinguished elsewhere. *United States* v. *Thomas,* 475 F.2d 115 (10th Cir. 1973) (defendant, in presence of U.S. Marshals, volunteers statement; exclusion not required since not a product of an uncounseled, in-custody interview). Two other cases have held that evidence obtained in violation of DR 7-104 is inadmissible, although in each a constitutional violation was found as well. In *Schantz* v. *Eyman, supra,* 418 F.2d at 71, a state habeas corpus case, the court found a gross violation of professional ethics where a district attorney had sent a psychiatrist to the home of a defendant who was pleading an insanity defense. In *United States* v. *Wedra, supra,* the court suppressed statements after finding that the defendant had not adequately waived his right to presence of counsel. The court then added that it would also have suppressed the statements under its supervisory power because of the "unfair and overreaching" nature of the interrogation. 343 F. Supp. at 1188.

The exclusionary sanction may be inefficacious for several reasons. First, appeals courts have generally been unwilling to upset otherwise valid convictions based on overwhelming evidence solely on the ground that evidence obtained unethically was admitted at trial. *See United States* v. *Cobbs, supra,* 481 F.2d at 200; *United States* v. *Springer, supra,* 460 F.2d at 1354; *United States* v. *Smith,* 379 F.2d 628, 633-34 (7th Cir. 1967). Furthermore, the misconduct may not give rise to evidence which the government seeks to introduce at trial.[43] *See, e.g., United States* v. *Woods, supra,* 544 F.2d 242. Finally, a defendant may not have standing to object to evidence obtained during an unethical interview with someone else. *See, e.g., United States* v. *Partin, supra,* 601 F.2d 1001.

More importantly, we do not believe that federal courts have the power to exclude evidence solely on the ground that DR 7-104 was violated. Courts have recognized that suppression of evidence for violation of the rule is an exercise of their "supervisory power," not a constitutional mandate. *See United States* v. *Smith, supra,* 379 F.2d at 633; *United States* v. *Wedra, supra,* 343 F. Supp. at 1188. The origin, nature, and scope of a federal court's "supervisory power" over the administration of justice has never been well defined. *See generally, United States* v. *Payner, Brief for the United States,* at 14-20, Oct. Term, 1979, No. 78-1729 (filed Nov. 1979). It is clear, however, that the power of a federal court "to prescribe rules of procedure and evidence for the Federal courts exists only in the absence of a relevant Act of Congress." *Palermo* v. *United States,* 360 U.S. 343, 353 n.11 (1959);

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[43] The Tenth Circuit in *United States* v. *Thomas, supra,* recognized that the fruits of misconduct might not be offered into evidence but left to a later day what sanction might be appropriate:

> The enforcement officials are agents of the prosecuting party, and in the event use is made of information secured by interviews [in violation of DR 7-104], short of its introduction in evidence, the problem will be dealt with in the proper case.

474 F.2d at 112.

accord, United States v. *National City Lines*, 334 U.S. 573, 589 (1948). *See Sibbach* v. *Wilson & Co.*, 312 U.S. 1, 9–10 (1941) (congressional authority includes power to regulate practices and procedures of federal courts).

Congress has spoken to the admissibility in criminal trials of statements by defendants. In an effort to limit (or overturn) *Miranda*, Congress enacted 28 U.S.C. § 3501(a), which provides that any confession or incriminating statement made by a defendant "shall be admissible in evidence if it is voluntarily given."[44] Excluding a defendant's statement, if voluntarily given, on the ground that the interview of the defendant was unethical would necessarily establish a new ground for exclusion not provided for by Congress. Under these circumstances, exclusion would appear to us to be an improper use of a court's supervisory power. The Third Circuit has so held. *United States* v. *Crook, supra*, 502 F.2d at 1380–81.[45] Other courts have indicated their uneasiness with relying upon their supervisory power to reverse a conviction solely on the ground that defendant's statement, otherwise voluntary, was obtained in violation of DR 7–104. *See, e.g., United States* v. *Smith, supra*, 379 F.2d at 633–34.

The recent draft of a proposed revision of the ABA Code of Professional Responsibility lends support for the inadvisability of excluding evidence for violation of the rule. In its discussion of the Code's "Scope and Definitions," it states:

> [T]he purpose of the Rules can be subverted when used by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.

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[44] To the extent that § 3501(a) is read to limit the protections afforded by *Miranda*, it is probably unconstitutional. *See, e.g., C. Wright & A. Miller, Federal Practice and Procedure* (Criminal) § 76, (1969). But courts have been adept at avoiding a ruling on the constitutionality of the section. *See, e.g., Ailsworth* v. *United States*, 448 F.2d 439, 441 (9th Cir. 1971).

[45] *United States* v. *Payner, supra*, presents an analogous issue. There the district court, relying on its supervisory power, excluded evidence obtained by an illegal search which the defendant did not have standing to contest. The Supreme Court granted *certiorari* to decide whether the district court possessed, and should have exercised, supervisory power to suppress evidence allegedly obtained as the result of an illegal search that did not violate the defendant's Fourth Amendment rights. The brief for the United States argues that Rule 402 of the Federal Rules of Evidence deems admissible all evidence not obtained in violation of the Constitution or federal law, and since the evidence at issue was obtained without violating the defendant's Fourth Amendment rights, it could not be suppressed under the district court's supervisory power. [NOTE.—The Supreme Court adopted this position, holding that: "the supervisory power does not authorize a federal court to suppress otherwise admissible evidence on the ground that it was seized unlawfully from a third party not before the court." *United States* v. *Payner*, 447 U.S. 727, 735 (1980). Ed.]

B. Dismissal of Indictments or Reversal of Convictions

If the violation of DR 7-104 does not produce evidence admitted at trial, the defendant usually asks a court to dismiss the indictment or reverse a conviction because of the prosecutor's misconduct. While courts are quick to condemn the government's conduct, they have not, to our knowledge, aborted a prosecution *solely* on the grounds of an ethical violation. *See, e.g., United States* v. *Partin, supra,* 601 F.2d 1000; *United States* v. *Glover, supra,* 596 F.2d 857; *United States* v. *Woods, supra,* 544 F.2d 242. Nor under our analysis above, would federal courts have the power to do so.

C. Bar Association Proceedings

Whether or not a federal court reverses a conviction because of prosecutorial misconduct, government attorneys whose actions arguably violate DR 7-104 run the risk of state bar disciplinary proceedings.

We are aware of at least one state bar proceeding initiated against an AUSA based upon the complaint of a defendant's attorney charging a violation of DR 7-104. The findings of facts of the Michigan Attorney Discipline Board recite that two FBI agents believed that the attorney of a defendant indicted for conspiracy to escape had been an active participant in the conspiracy. When the agents "mentioned in passing" to the AUSA their intention to contact the defendant regarding the attorney's involvement, the AUSA "questioned the wisdom and fruitfulness of making such a contact." Later, the agents again mentioned to the AUSA that they would contact the defendant; they "did not seek to secure the permission" of the AUSA, nor did the AUSA "encourage, direct or request" the agents to make the contact. However, the AUSA "did not attempt to prevent the contact and did not consult with the Court concerning the possible contact by the Agents." The complaint was dismissed by the Board upon the following Stipulation of Counsel:

> that even in the unusual circumstances of this case, it would have been better practice if [the AUSA] had proceeded with greater caution by taking the initiative to approach the court, note the problem and ask for instructions . . .

In the Matter of Rosen, Certified Report of Wayne County Hearing Panel #15 of the Attorney Discipline Board, File 35019-A (Dec. 27, 1978). This example makes clear the real threat that state bar disciplinary boards will initiate proceedings for violations of DR 7-104 by federal prosecutors. Even if the board finds for the government, the time spent in defending such actions may be a considerable burden on scarce prosecutorial resources.

A strong, and we believe persuasive, argument may be lodged against any attempt by a state bar association to impose sanctions on a government attorney who is acting lawfully and in pursuance of his federal law enforcement responsibilities. It is well established that the Supremacy Clause bars state authorities from regulating the conduct of United States employees in the performance of their official duties in a manner inconsistent with federal law.[46] *See Hancock* v. *Train,* 426 U.S. 167, 178–81 (1976); *In re Neagle,* 135 U.S. 1, 75 (1890); *Clifton* v. *Cox,* 549 F.2d 722 (9th Cir. 1977); *State of Arizona* v. *Manypenny,* 445 F. Supp. 1123 (D. Ariz. 1977). Nor may a state, under the guise of regulating the bar, prohibit a person from performing functions within the scope of federal authority. *See Sperry* v. *Florida,* 373 U.S. 379 (1963) (where Patent Office permits non-lawyers to practice before it, Supremacy Clause prohibits Florida from enjoining such conduct as "unauthorized practice"). Thus, where an FBI agent or AUSA contacts subjects or defendants in furtherance of his federal law enforcement responsibilities, a state bar association may not burden that activity by imposing sanctions.

VI. Conclusion and Recommendations

The adoption of a Department of Justice policy on DR 7–104 which does not fully satisfy the existing and probable interpretations of the rule would undoubtedly lead to continuing vexatious litigation, confrontation between the Department and certain courts, and nettlesome actions by state bar associations. We are confident, however, that a Department policy reasonably grounded in concerns for vigorous law enforcement, and balanced against the constitutional rights of criminal defendants, would ultimately prevail. Although the choices to be made as a matter of policy are not likely to be easy ones, we believe that the primary legal constraints on the choices available should be viewed, for the present, as constitutional ones.

As we indicated at the outset of this memorandum, and as we had indicated informally in March of 1979, we believe that the involvement of all investigatory and litigating elements in the Department is crucial to the development of sound policy. Although the focus on this effort to date has largely been concentrated in the criminal arena, addressing these issues in the context of purely civil litigation would seem to us to be a logical and necessary step.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

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[46] The Department has vigorously asserted this argument in a September 11, 1979 memorandum from Acting Associate Attorney General Shenefield to the District of Columbia Court of Appeals regarding proposed amendments to provisions implementing Canon 9 of the D.C. Bar Code of Professional Responsibility. *See also* Memorandum from then Associate Attorney General Egan to the D.C. Bar Committee on Legal Ethics, April 6, 1979 (regarding proposed amendments to DR 7–104).

Part-Time Government Official's Receipt of Compensation for Representational Work Before the Government

As a special government employee, part-time Commissioner of Foreign Claims Settlement Commission is barred by 18 U S.C. § 203 from representing anyone before a component of the Justice Department for compensation.

Part-time government official who is not a partner of his law firm may continue to receive compensation from his firm which is attributable to representational work before the Justice Department.

Part-time government official's law firm may represent clients before any component of the Justice Department except the Commission.

May 2, 1980

MEMORANDUM OPINION FOR THE CHAIRMAN OF THE FOREIGN CLAIMS SETTLEMENT COMMISSION

This confirms the information we gave to Mr. A by telephone concerning the effect of 18 U.S.C. § 203 on him and the law firm he is affiliated with during his contemplated service as a part-time Commissioner of your agency.

Section 203(a) in general prohibits an individual from receiving compensation for representational services performed before a government department or agency by "himself or another . . . at a time when he is an officer or employee" of the government. Section 203(c) narrows to two situations the prohibition of subsection (a) in relation to a person serving as a special government employee (SGE) as defined in 18 U.S.C. § 202(a), a category in which we understand Mr. A will be placed when he assumes his office. First, § 203(c) bars an SGE from receipt of the described compensation if it is derived from a matter in which he has participated for the government. Second, it bars him from the receipt of such compensation derived from a matter in which he has not so participated, but only (1) if it is pending in the department or agency where he is employed and (2) if the activity giving rise to the compensation occurred at a time when he has served there more than 60 days during the immediately preceding 365 days.

As applied to Mr. A while he holds the position of Commissioner of your agency, § 203 would preclude him from representing anyone before a component of the Justice Department for compensation whenever the 60-day provision came into play against him. On the other hand, since, as Mr. A informed us, he is not a partner of his firm and is not compensated like one, § 203 will not during the continuation of those circumstances preclude his receipt of any payment from the firm which is attributable to its earnings from representational work before this Department. In short, the prohibition of § 203 against an individual's receipt of compensation for services rendered by another does not extend to an individual employed in a law partnership who does not share in its profits.

Mr. A's contemplated occupancy of office as Commissioner will not restrict his firm from representing clients before any component of the Justice Department except the Commission. *See* 18 U.S.C. § 207(g).

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

Severance Agreement Between a Prospective Federal Appointee and His Law Firm

Severance arrangements between a prospective appointee to federal office and his law firm do not result in an unlawful supplementation of his federal salary in violation of 18 U.S.C. § 209, notwithstanding the fact that they deviate in certain respects from the terms of the law firm's partnership agreement.

May 7, 1980

MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT

This is in response to your request of our review of the withdrawal agreement entered into by Mr. A, a nominee to federal office, and the law firm of which he is a partner, Firm X. More particularly, you ask whether the agreement is consistent with the federal conflict of interest laws, including 18 U.S.C. § 209. That statute in general prevents an officer or employee of the Executive Branch from receiving, or anyone from paying him, any salary or supplementation of salary for his services to the government.

Article VIII of the Firm X partnership agreement, provides for retirement, with a cash benefit payable in 60 monthly installments, for a partner who leaves the firm under certain conditions. Mr. A is eligible for retirement, which under the agreement would terminate his interest in the partnership. A technique for less than complete severance from the firm is provided by Article XIII-2 of the agreement. It authorizes a temporary withdrawal of a partner for a period of no longer than 15 months, subject to such terms and conditions as a majority of the other partners may specify. A temporary withdrawal does not terminate a partner's interest and he remains a member of the firm. You will recall that Mr. A informed us at our meeting with him that his firm was agreeable to his choice of departure under either Article VIII or Article XIII-2 and would approve the same financial arrangements under either option. Mr. A chose retirement under Article VIII and the withdrawal agreement was drawn accordingly.

The withdrawal agreement will come into force on the day of Mr. A's confirmation by the Senate. It provides for variations from the Firm X partnership agreement in connection with his capital account and the payment of his retirement benefits. Under Article VIII-3(a) and

VII-2(a) and (d) of the latter document, the capital account would be paid within 90 days after separation and the monthly retirement payments would commence at the end of the month following his retirement. However, the withdrawal agreement provides for the firm to defer liquidation of the capital account until Mr. A requests it and to defer initiation of the retirement installments for 24 months after his separation from Firm X, unless he is readmitted to membership before then or if the 24-month period is extended by mutual consent.

It is appropriate to consider first the element of intent on the part of Firm X and Mr. A. If the firm and he went beyond the provisions of Articles VIII and VII-2(a) and (d) with a view to providing something of value to him as a supplement to his federal salary, then § 209(a) would be a bar to his filling that office and our discussion would end at this point. However, there is nothing in the circumstances here to suggest that the firm was motivated by anything but a desire to accommodate Mr. A in recognition of his years of membership in it, or that he had in mind obtaining from the firm a subsidy of his employment by the government. We have no difficulty in ruling out both possibilities. *See* 41 Op. Att'y Gen. 217, 221 (1955).

Remaining for consideration in relation to § 209(a) is the question whether the withdrawal agreement is *per se* inconsistent with Mr. A's taking and remaining in office. Had that agreement followed the terms of the partnership compact, there would be no doubt that any benefits that might flow from it to Mr. A would fall within the exemption from § 209(a) granted by § 209(b) with respect to a "bona fide . . . retirement . . . plan maintained by a former employer." However, the described variations raise the question whether the withdrawal agreement itself bestows on Mr. A a form of "contribution to or supplementation of salary, as compensation for his services as an officer" of the federal government that is not waived by § 209(b).

The deferral of the payout of Mr. A's capital account will provide no significant financial benefit to him that we are aware of. On the other hand, he has stated that he requested the temporary deferment of the retirement payments in order to reduce the amount of income tax liability they would otherwise generate. This Office has generally viewed severance arrangements that minimize a recipient's tax liability as not cutting across the prohibition of § 209(a). Nevertheless, for the reasons set forth below, we do not find it necessary to pass on the agreed variations from Firm X's retirement program in that context.

It appears that if Mr. A and his firm had determined that he should undertake his projected government service while remaining a member of the firm under Article XIII-2 of its governing instrument, in addition to forgoing his share of profits during his absence, he would not receive the return of his capital or any retirement payments. Thus, he would be in the same position as the withdrawal agreement calls for but would have avoided the question under consideration here. As a practical matter, however, temporary withdrawal under Article XIII-2 was and is not open to him as a means of avoiding the possible impact of § 209(a). That is so because, as you informed him at our meeting, White House policy prevents a partner of a law firm from serving the government under a presidential appointment to a full-time post unless he withdraws from the firm. That condition would not be met by the mere temporary suspension of Mr. A under Article XIII-2.

It would be anomalous to conclude on the one hand that § 209(a) stands in the way of the financial arrangement worked out between Mr. A and his firm because it deviates to some extent from certain provisions of the partnership agreement, and to conclude on the other hand that the same financial arrangement under other provisions of the partnership agreement would comport with § 209(a). Because the White House policy that has intervened to prevent resort to the latter provisions is not based on any prohibition of § 209(a), we do not believe that any purpose of the statute would be furthered by reading it to require this formalistic stalemate and the consequent loss of Mr. A's services to the government. In short, we are of the opinion that implementation of the executed withdrawal agreement, just like implementation of a similar agreement drawn under Article XIII-2, would not contravene § 209(a).

The withdrawal agreement need not be examined in the light of any of § 209's companion conflict of interest statutes except 18 U.S.C. § 208, which prohibits a federal employee from participating in a matter for the government in which, to his knowledge, "he, his . . . partner . . . or any person or organization with whom he is negotiating or has any arrangement concerning prospective employment, has a financial interest. . . ." The term "financial interest" does not extend to the creditor's claim against his firm that Mr. A will have when the withdrawal agreement comes into force. Nevertheless, in order to avoid adverse appearances, Mr. A should recuse himself from any matter which may come before him as an official of the government in which Firm X appears as counsel or otherwise has a financial interest.

Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel

Application of the Privacy Act to the Personnel Records of Employees in the Copyright Office

The Copyright Office is in the legislative branch, and is not an "agency" within the coverage of the Privacy Act.

It is constitutionally permissible for an officer of the legislative branch, such as the Register of Copyrights, to perform executive functions, as long as the officer is appointed in accordance with the Appointments Clause.

The personnel records of the Copyright Office are not subject to the Privacy Act by virtue of 17 U.S.C. § 701(d), because personnel actions taken by the Register of Copyrights are an incident of the personnel administration of the Library of Congress.

May 8, 1980

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, OFFICE OF MANAGEMENT AND BUDGET

This responds to your inquiry requesting our opinion whether personnel records maintained by the Copyright Office are subject to the Privacy Act, 5 U.S.C. § 552a. The matter arises out of a denial by the Copyright Office of a request by a former employee for permission to have access to his personnel records, on the ground that its personnel records are not subject to the Privacy Act. The Office concluded that while 17 U.S.C. § 701(d) makes the actions of the Register of Copyrights in administering the Copyright Act subject to the Administrative Procedure Act, which includes the Privacy Act, the personnel records of the employees of the Copyright Office are not maintained in connection with the administration of the Copyright Act, but as an incident of the personnel administration of the Library of Congress which, being a legislative agency, is not subject to the Privacy Act. The denial was brought to the attention of your Office, which, under § 6 of the Privacy Act, 5 U.S.C. § 552a note, is charged with providing assistance to and oversight of implementation of the Act by agencies.

The questions at issue are whether the Privacy Act covers the Copyright Office, and if not, whether the Office is subject to that act by virtue of the provisions of the Copyright Act. The Privacy Act provides, with exceptions not pertinent here, for access by an individual to his own records in an "agency." 5 U.S.C. § 552a(d).

I.

In order to determine whether the Copyright Office is an agency covered by the Privacy Act we turn to the definition of that term in the Act, 5 U.S.C. § 552a(a)(1). It provides that "the term 'agency' means agency as defined in section 552(e) of this title." That definition reads as follows:

> (e) For purposes of this section, the term "agency" as defined in section 551(1) of this title includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency.

Section 552(e) thus limits the coverage of the Privacy Act to agencies as defined in § 551(1). That section expressly exempts Congress from the term "agency." [1] This exception has been interpreted as not being limited to Congress itself but as including the various agencies in the legislative branch of the federal government.

The question therefore is to ascertain whether the Copyright Office is an agency in the legislative branch. Before this can be done it is first necessary to outline the genesis of the agency and the organizational status of the Copyright Office.

The administration of the copyright laws was transferred to the Library of Congress by § 85 of the Act of July 8, 1870, 16 Stat. 212. Beginning in the 1880's, a copyright office was administratively established in the Library of Congress.[2] This action received recognition in appropriations acts which, beginning with the Act of February 19, 1897, 29 Stat. 538, 544, 545, made appropriations for a copyright department or copyright office "under the direction of the Librarian of Congress," and provided for the compensation of a register of copyrights.[3] Section 47 of the Copyright Act of 1907, Pub. L. No. 60-349, 35 Stat. 1075, 1085, gave substantive statutory recognition to the "copyright office, Library of Congress," "under the control of the register of copyrights, who shall, under the direction and supervision of the Librarian of Congress, perform all the duties relating to the registration of copyrights." Section 48 of that Act provided for the appointment of a register of copyrights by the Librarian of Congress, and for the appointment by the Librarian of Congress of "such subordinate assistants to the register as may from time to time be authorized by law." 35 Stat. 1085.

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[1] Section 551(1), referred to in § 552(e), reads:

> For the purpose of this subchapter—(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—
>
> (A) the Congress;
>
> (B) the courts of the United States;
>
> (C) the governments of the territories or possessions of the United States;
>
> (D) the government of the District of Columbia; or except as to the requirements of section 552 of this title—
>
> (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
>
> (F) courts martial and military commissions;
>
> (G) military authority exercised in the field in time of war or in occupied territory; or
>
> (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix; . . .

[2] Brylawski, *The Copyright Office: A Constitutional Confrontation*, 44 Geo. Wash. L. Rev. 1, 14–15 n.15(a) (1975).

The present law, the Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, follows this pattern. The pertinent section, 17 U.S.C. § 701(a), states:

> All administrative functions and duties under this title, except as otherwise specified, are the responsibility of the Register of Copyrights as director of the Copyright Office of the Library of Congress. The Register of Copyrights, together with the subordinate officers and employees of the Copyright Office, shall be appointed by the Librarian of Congress, and shall act under the Librarian's general direction and supervision.

The 1976 provision thus continues the status of the Copyright Office and its employees as in the Library of Congress. The Copyright Office is referred to as the Copyright Office "of" the Library of Congress, and its staff, including the Register, are appointed by the Librarian of Congress and act under the Librarian's general direction and supervision. The explanation of §§ 701-710 of the Act in the Senate report (S. Rep. No. 94-473, at 153), stating that (apart from a matter not pertinent here), "these sections appear to present no problems of content or interpretation requiring comment here," indicates that no substantial change in the preexisting law was intended.

The Copyright Office thus is a part of the Library of Congress.[4] It has been firmly established that the Library of Congress, and consequently its subdivision the Copyright Office, are in the legislative and not in the executive branch of the government. Both are included in the Appropriation Acts for the legislative branch;[5] the Congressional Directory and United States Government Manual both list them as entities in the legislative branch. The latter points out that the Register of Copyrights is also Assistant Librarian for Copyright Services. Signifi-

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[3] *See also* the Appropriation Act of April 17, 1900, 31 Stat. 86, 95.

[4] According to Library of Congress Regulation No. 210-1, the Copyright Office is a "department of the Library of Congress." In 39 Op. Att'y Gen. 429 (1940), the Attorney General observed that the Copyright Office "while within the Library of Congress, is a separate and distinct office." That statement, however, was made in the context of a separate appropriation for the Copyright Office which prevented the use of Library of Congress funds for Copyright Office purposes.

[5] *See, e.g.*, Legislative Branch Appropriation Act, 1979, 92 Stat. 784-785.

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cantly, the laws relating to the Library of Congress are codified in Title 2 of the United States Code, which deals with Congress.

More specifically, the Act of October 13, 1977, 2 U.S.C. § 171 (Supp.), states that on April 24, 1800, the Congress "established for itself a Library of Congress." The Ethics in Government Act of 1978 which requires the filing of financial reports by officers and employees of the legislative branch states expressly that that branch includes, *inter alia,* the Library of Congress. 2 U.S.C. § 701(b), (e). Conversely, in several sections of Title 5, United States Code, Congress has specifically included the Library of Congress within the term "agency." *See* 5 U.S.C. § 3102 (readers for blind employees); § 5721 (travel and transportation expenses); § 5595 (severance pay); § 5596 (back pay for unjustified personnel action). It is plain that when Congress intended the Library of Congress to be an agency within the scope of Title 5 it expressed that intention by specific language. It did not do so for the purpose of the Privacy Act. The Copyright Office being a component of the Library of Congress, therefore, is not within the coverage of the Privacy Act.

The decision in *Eltra Corporation* v. *Ringer,* 579 F.2d 294 (D.C. Cir. 1978), does not lead to a contrary result. That case involved the question whether under the constitutional doctrine of the separation of powers the Copyright Office could be located in the legislative branch since the Register of Copyrights performed an executive function in administering the Copyright Act. The court did agree that the Register performed such a function; in that context it was irrelevant that the office of the Librarian of Congress was by statute codified as part of the legislative branch and had its funding included in the appropriation for the legislative branch. *Id.* at 301. The court, however, held that the Constitution did not prevent placing an officer performing executive functions in the legislative branch, if he had been appointed in accordance with the Appointments Clause of the Constitution, Art. II, § 2, cl. 2. The court opined that the clause had been complied with because the Librarian of Congress is appointed by the President by and with the advice and consent of the Senate, and the Register by the Librarian, the head of his department.

The conclusion of the court that the Register performs executive functions does not render the Privacy Act applicable to the Copyright Office. The Privacy Act, as we have shown above, applies by its very terms to agencies in the executive *branch,* not to agencies performing executive *functions.* Moreover, in contrast to the Appointments Clause, there is no constitutional requirement that the Privacy Act apply to all agencies performing executive functions. Congress has complete discretion to decide which agencies, whether executive or not, should be covered by that Act.

II.

The conclusion we have reached above however, does not fully dispose of your inquiry. There remains a question concerning 17 U.S.C. § 701(d), providing that "all actions taken by the Register of Copyrights under this Title [i.e., Title 17, U.S. Code] are subject to the provisions of the Administrative Procedure Act . . ." of which the Privacy Act is a part. Does this mean that the activities by the Register of Copyrights related to personnel records of persons employed in the Copyright Office are "actions" under Title 17? Our answer is in the negative.

Under 17 U.S.C. § 701(a), the subordinate officers or employees of the Copyright Office are appointed not by the Register of Copyrights but by the Librarian of Congress. Accordingly they are employees of the Librarian, not of the Register of Copyrights. Pursuant to 2 U.S.C. § 136 the Librarian is authorized to make rules and regulations for the "government of the Library." The government of the Library plainly includes matters pertaining to the employment, direction, and general supervision of the personnel of the Library.

Pursuant to his authority under 5 U.S.C. § 302, the Librarian has delegated most of his personnel functions to the Director for Personnel, and some to the department heads, such as the Register. *See* Library of Congress Regulations 2011-4 and 2010-11.

Thus personnel actions taken by the Register are not taken by him in his capacity as Register under Title 17 but as Assistant Librarian for Copyright Services, a department head in the Library of Congress. Those functions, therefore, are carried out under Titles 2 and 5 of the United States Code.

Accordingly, personnel records of the employees in the Copyright Office are no more covered by the Privacy Act than the personnel records of other employees in the Library of Congress.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

Applicability of the Architectural Barriers Act of 1968 to Buildings Financed with Federal Funds

Architectural Barriers Act of 1968 applies only where federal grants or loans are used to finance the design, construction, or alteration of a building, and does not apply where a building is merely leased with federal funds.

While the text and legislative history of the 1968 Act are ambiguous as to whether its applicability depends on actual issuance of standards for design, construction, or alteration, both subsequent amendments to the Act and consistent administrative interpretation—support the conclusion that the Act applies if such standards are authorized under the law authorizing the grant or loan, even if they have not been issued.

May 8, 1980

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION

This responds to your memorandum requesting this Office to resolve questions that have arisen concerning the scope of § 1 of the Architectural Barriers Act of 1968 (Act), 42 U.S.C. § 4151. Attached to your memorandum were memoranda of the General Counsel of the Department of Health, Education and Welfare (HEW) and the General Counsel of the Architectural and Transportation Barriers Compliance Board (ATBCB), presenting their respective positions. As set forth in the cover letters attached to their memoranda, the questions on which HEW and ATBCB have agreed to request our opinion are: (1) whether the Act extends to buildings leased by a recipient of a federal grant or loan where the recipient uses the federal funds to make rental payments; and (2) whether the Act covers only those buildings for which standards for design, construction, or alteration actually have been imposed, either by statute or by regulation. For the reasons set forth below, we conclude that the Act covers those buildings for which standards are authorized, even if they have not actually been imposed, but that the Act does not extend to buildings leased by recipients of federal grants or loans where the funds were not made available for building construction or alteration.

Before considering the particular statute in question, it is necessary briefly to review the history and purpose of the Act, and subsequent legislative developments.[1] Enacted in 1968, the Act was designed to insure that all buildings "constructed in the future by or on behalf of the Federal Government or with loans or grants from the Federal Government are designed and constructed in such a way that they will be accessible to and usable by the physically handicapped." S. Rep. No. 538, 90th Cong., 1st Sess. 2 (1967). In § 2, it authorized the Administrator of General Services, in consultation with the Secretary of HEW, to prescribe such standards for the design, construction, and alteration of buildings as may be necessary to insure that physically handicapped persons will have ready access to, and use of, such buildings.[2] After the effective date of a standard issued under the Act, every building subject to the Act was required to be designed, constructed, or altered in accordance with such standard.[3] For purposes of the Act, the word "building" was defined as follows:

> [T]he term "building" means any building or facility . . . the intended use for which either will require that such building or facility be accessible to the public, or may result in the employment or residence therein of physically handicapped persons, which building or facility is—
> (1) to be constructed or altered by or on behalf of the United States;
> (2) to be leased in whole or in part by the United States after the date of enactment of this Act after construction or alteration in accordance with plans and specifications of the United States; or
> (3) to be financed in whole or in part by a grant or a loan made by the United States after the date of enactment of this Act if such building or facility is subject to standards for design, construction, or alteration issued under authority of the law authorizing such grant or loan.

Architectural Barriers Act, § 1, 82 Stat. 718 (1968) (current version at 42 U.S.C. § 4151).

In 1970, the Act was amended to include the buildings and structures constructed by the Washington Metropolitan Transit Authority. Act of March 5, 1970, 84 Stat. 49 (codified at 42 U.S.C. § 4151). Because the Transit Authority is a regional agency formed by compact and not a federal agency, and because its buildings are not subject to regulation for design, construction, or alteration issued under authority of the law authorizing federal funds, the question arose whether it was covered by the Act. S. Rep. No. 658, 91st Cong., 2d Sess. 2 (1970). The amendment was passed to clarify the Act by clearly including the Washington subway system.[4]

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[1] For an analysis of the legislative history of the Act and its implementation, *see* Minority Staff of Senate Comm. on Environment and Public Works, 96th Cong., 1st Sess., Architectural Barriers In Federal Buildings (Comm. Print 1979).

[2] 82 Stat. 719 (1968). There were two exceptions to § 2. For residential structures subject to the Act, the Secretary of Housing and Urban Development was authorized to prescribe standards. *See* Architectural Barriers Act, § 3, 82 Stat. 719 (1968) (current version at 42 U.S.C. § 4153). For facilities of the Department of Defense subject to the Act, the Secretary of Defense was authorized to prescribe standards. *Id.* at § 4, 82 Stat. 719 (1968) (current version at 42 U.S.C. § 4154). Both officials were directed to consult with the Secretary of HEW.

[3] Architectural Barriers Act, § 5, 82 Stat. 719 (1968) (codified at 42 U.S.C. § 4155). The Act did allow exceptions to be made in some circumstances. *Id.*, § 6, 82 Stat. 719 (1968) (current version at 42 U.S.C. §4156).

As a result of a report by the General Accounting Office,[5] the Act again was amended in 1976 to "assure more effective implementation of the congressional policy to eliminate architectural barriers to physically handicapped persons in most federally occupied or sponsored buildings." H.R. Rep. No. 1584—Part I, 94th Cong., 2d Sess. 1 (1976). The amendment changed the law by extending its coverage to include the United States Postal Service; buildings privately owned, but used to provide public or federally subsidized housing; and all buildings to be leased in whole or in part by the United States. It also removed some of the discretionary authority of the administrative agencies. *See* Public Buildings Cooperative Use Act of 1976, § 201, 90 Stat. 2507 (codified at 42 U.S.C. §§ 4151–4156).

Since the passage of the Architectural Barriers Act, other steps have been taken by the federal government to eliminate architectural barriers in public buildings. In 1973, Congress passed the Rehabilitation Act, Pub. L. No. 93–112, 87 Stat. 355, an extensive revision of statutes dealing with vocational rehabilitation. Two of its provisions are relevant to the questions presented here. Section 502 of the Rehabilitation Act established the ATBCB to insure compliance with standards prescribed pursuant to the Architectural Barriers Act. 87 Stat. 391–393 (current version at 29 U.S.C. § 792). According to the Senate Labor and Public Welfare Committee, a new federal board was needed "to insure compliance with the present Federal statutes regarding architectural barriers since compliance has been very spotty and there is no such comparable compliance unit in existence. . . ." S. Rep. No. 318, 93d Cong., 1st Sess. 49 (1973). As amended by subsequent legislation, § 502 now provides that it is the function of the ATBCB to insure compliance with the standards prescribed pursuant to the Architectural Barriers Act, including enforcing all standards under that Act and establishing minimum guidelines and requirements for such standards. 29 U.S.C. § 792(b)(1)–(7). In carrying out its functions, the Board may issue orders of compliance, including the withholding or suspension of federal funds with respect to any building found not to be in compliance with standards being enforced. 29 U.S.C. § 792(d)(1).

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[4] The amendment added subparagraph (4) to the definition of "building" in 42 U.S.C. § 4151. As used in the Act, "building" thus included any building or facility "to be constructed under authority of the National Capital Transportation Act of 1960, the National Capital Transportation Act of 1965, or title III of the Washington Metropolitan Area Transit Regulation Compact."

[5] Report of United States Comptroller General, "Further Action Needed to Make All Public Buildings Accessible to the Physically Handicapped" (July 15, 1975).

Section 504 of the Rehabilitation Act provided that "[n]o otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 87 Stat. 394 (codified at 29 U.S.C. § 794). Executive Order No. 11914, issued in 1976, directs the HEW Secretary to coordinate the implementation of § 504 by all federal departments and agencies empowered to extend financial assistance to any program or activity. Exec. Order No. 11914, 45 C.F.R. Part 85 App. A (1979). The order also directs the Secretary to establish guidelines for agency standards for determining what are discriminatory practices, and, if voluntary compliance cannot be secured informally, authorizes the suspension or termination of financial assistance. Section 5 of the executive order authorizes the Secretary to adopt rules to carry out the Secretary's responsibilities. The rules so adopted require in part that a program recipient's facilities be accessible to handicapped persons. 45 C.F.R. § 85.56–85.58. Thus, although the executive order requires the Secretary to insure that HEW regulations are not inconsistent with or duplicative of other federal policies relating to the handicapped (including the Architectural Barriers Act), HEW and ATBCB do have overlapping jurisdiction as to certain aspects of federal programs and activities. The questions presented here, which arise out of those agencies' conflicting interpretations of the Architectural Barriers Act, do not directly address that overlapping jurisdiction. Resolution of those questions, however, will determine the scope of the Act and, hence, the scope of ATBCB's derivative jurisdiction.

Both of the questions presented here require an interpretation of subparagraph (3) of 42 U.S.C. § 4151. That subparagraph provides that the term "building" means any building or facility "to be financed in whole or in part by a grant or a loan made by the United States after August 12, 1968, if such building or facility is subject to standards for design, construction, or alteration issued under authority of the law authorizing such grant or loan." The first question we address is whether the quoted phrase includes buildings leased with federal funds by grant or loan recipients of the federal government. To include such buildings, the phrase "financed in whole or in part by a grant or a loan" must be found to include payments of rent to owners of buildings leased by grant or loan recipients. The plain language of the statute as well as its legislative history make clear that the Act does not reach so far.

I.

In common usage, "financing" a building generally refers to the method of payment for purchase of the building or the labor and materials needed to construct or alter it. The phrase "financed in whole or in part" appeared in both the House and Senate versions of the bill. The Senate version provided that the term "public building" means any non-residential building "financed in whole or in part with funds provided by a grant or loan made by the Federal Government." S. 222, 90th Cong., 1st Sess. (1967).[6] The amended House version, H.R. 6589, contained the language which eventually became § 4151. Because of conflicting language in the two bills, a conference committee was convened. 114 Cong. Rec. 20,683 (1968). The conference committee recommended that the House version be passed with one amendment not relevant here. H.R. Rep. No. 1787, 90th Cong., 2d Sess. 1 (1968). This recommendation was agreed to in both Houses. 114 Cong. Rec. 23,722, 24,038 (1968).

Hearings were held by both House and Senate committees. Throughout these hearings, as well as throughout the reports of the congressional committees, it is apparent that this legislation was intended to cover construction of new buildings or planned alteration of existing buildings. There is no indication that it alone was meant to trigger alterations of existing buildings, whether owned by the federal government, leased by the federal government, or owned or leased by recipients of federal funds. In the Senate hearings on S. 222, the sponsor of the bill, Senator Bartlett, testified as follows:

> S. 222 is a simple bill. It seeks only to require that public buildings constructed with Federal funds, whether by or on behalf of the Federal Government or through a grant or loan to some other organization, be designed in such a manner that they be accessible to all the public, including the physically handicapped. I would emphasize here that I would be opposed to amendment to this bill requiring alteration of existing public buildings. Such a program would be, in my view, too expensive to undertake at this time. It is my belief that existing access problems which need remedial action should be taken up on a case-by-case basis.

Accessibility of Public Buildings to the Physically Handicapped: Hearings on S. 222 Before the Subcomm. on Public Buildings and Grounds of the Sen. Comm. on Public Works, 90th Cong., 1st Sess. 3 (1967). If "financed" included leasing, the Act would require massive and costly alterations in the many buildings leased or to be leased by recipients of federal funds, contrary to the sponsor's intent. Other statements made at Senate hearings also imply that the Act does not include leased buildings. A representative of the Department of Housing and Urban Development testified that the bill would cover "all contracts for the construction of public buildings, and all grants or loans made by the Federal Government or any department or agency thereof *for the purpose of financing the construction of public buildings. . . .*" [7] *Id.*, at 52 (emphasis added). Another witness urged that the words "alter" and "remodel" be included in S. 222 so that the bill would not be limited to new construction but "would also result in causing existing structures to conform to architectural barrierless standards *as changes are made in such structures.*" *Id.*, at 84. (Statement of J.F. Nagle.) Reference to "alteration" subsequently was added to the bill.

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[6] The Senate unanimously passed S. 222 in 1967. 113 Cong. Rec. 24,133 (1967). The House did not act on either S. 222 or its own bill, H.R. 6589, until 1968.

Nor do statements made by witnesses at the House hearings on H.R. 6589 and S. 222 disclose any belief that the Act would require recipients of federal funds to lease only accessible buildings. Senator Bartlett repeated that it would only apply to those buildings "to be built in the future." *Building Design for the Physically Handicapped: Hearings on H.R. 6589 and S. 222 Before the Subcomm. on Public Buildings and Grounds of the House Comm. on Public Works* [*House Hearings*], 90th Cong., 2d Sess. 5 (1968). Congressman Bennett, the sponsor of H.R. 6589, stated that the legislation "would insure that public buildings financed with public funds be designed to be accessible. . . ." *Id.*, at 7. The entirety of his brief testimony indicates his understanding that "financed" refers to construction or alteration and not to making rental payments. He emphasized the possible cost savings for "construction and design of buildings," and the cruelty of continuing "to approve plans for public buildings" which are inaccessible to the handicapped. *Id.* In discussing the definition of "public building" financed with federal funds, Representative Grover used the example of a small business which gets a loan to construct a small factory, and even including this, he suggested, may reach too far. *Id.*, at 35.

The conclusion that the term "financing" refers to financing the *construction* of a building also finds support in the committee reports. In the Senate report, the Committee summary of the bill states that S. 222 will require "that grants or loans made by the Federal Government *for the purpose of financing the construction of public buildings* be made upon the condition that the design and construction of such buildings shall comply with the regulations." S. Rep. No. 538, 90th Cong., 1st Sess. 1–2 (1967) (emphasis added). The report stated that the legislation was necessary "to insure that all public buildings constructed in the future by or on behalf of the Federal Government or with loans or grants from the Federal Government" are designed to be accessible. *Id.*, at 2. The House report on H.R. 6589 [H.R. Rep. No. 1532, 90th Cong., 2d Sess. 2–3 (1968)] and the congressional debates reveal the same intent. For example, Representative Cleveland, a co-sponsor of H.R. 6589, stated: "It would not require alteration of already existing buildings, except to set design standards if alterations were undertaken anyway." 114 Cong. Rec. 17,432 (1968).

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[7] The word "public" in the term "public building" in S. 222 was deleted when the conference adopted the House language.

The difficulty in applying subparagraph (3) to leases by loan or grant recipients is compounded by the second phrase of that paragraph which provides that buildings financed with federal funds are included only "if such building or facility is subject to standards for design, construction, or alteration issued under authority of the law authorizing such grant or loan." If the extent of federal involvement is the grant or loan of program funds used solely to lease a building or facility, it is highly improbable that the law authorizing the grant or loan would authorize issuance of standards for design, construction, or alteration of the building.

The treatment in § 4151 of buildings leased directly by the federal government also indicates that the Act does not cover buildings leased with loan or grant money. H.R. 6589, as amended in the second session of the 90th Congress, provided that the term "building" would include buildings "leased in whole or in part by the United States after the date of enactment of this Act after construction or alteration in accordance with plans and specifications of the United States." This language was adopted by the conference committee [8] and became subparagraph (2) of § 4151.[9] The House report explains that this language includes buildings "to be leased and constructed or altered pursuant to plans and specifications specified by the Federal Government. . . ." H.R. Rep. No. 1532, 90th Cong., 2d Sess. 3 (1968).

In the early versions of S. 222 and H.R. 6589, leasing was not specifically mentioned. At the House hearings, Representative Grover asked Senator Bartlett the following question: "In view of the language in the bill, Senator, do you think that in (1)(a) where you talk about public buildings being constructed by or on behalf of the Federal Government, do you think that is broad enough to take in the wide range of leasing arrangements that the Federal Government has with respect to Federal Government buildings?" The Senator responded: "I should hope that the regulations of the General Services Administrator would make that abundantly clear. But if there is any doubt, sir, I would favor writing it into the language of the act." House Hearings, *supra* at 6. Representative Grover's question prompted additional discussion of the leasing question. During the testimony of William Schmidt, a representative of the General Services Administration, the following colloquy occurred between Mr. Schmidt and Representative Gray:

> Mr. Gray: I notice on page 2 of your statement, you say:
>
> Thus, the legislation encompasses not only buildings con-

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[8] H.R. Conf. Rep. 1787, 90th Cong., 2d Sess. 1 (1968).

[9] 82 Stat. 718 (1968). This section was amended in 1976. *See* n. 10 *infra*.

> structed by GSA under the provisions of the Public Buildings Act of 1959, but all structures which must be used by the public and which are financed at least in part by Federal funds.
>
> Did you hear the question that was propounded to Senator Bartlett when we asked him if he felt that Post Office buildings and other projects, wholly owned by private enterprise, but leased to the Federal Government would be covered under the existing bill; or is it your feeling that we should tighten it up so as to make that clearer?
>
> Mr. Schmidt: I think the language is susceptible to the interpretation that it includes leased buildings, that is, buildings leased in whole by the Government. But I do not believe this is clear in the Senate Report No. 538 that the bill was intended to cover these facilities.
>
> I think it is quite to the contrary.
>
> Mr. Gray: Do you think it should be written into the law, or do you think it could be covered adequately in the House report?
>
> Mr. Schmidt: Actually I would see no objections to the inclusion of leased buildings, that is buildings leased by the Government, to be constructed or under construction, or altered. In fact we are beginning to include this requirement in our leasing procedures on all buildings to be constructed.
>
> Mr. Gray: Do you think adding the word "leased" would cover it?
>
> Mr. Schmidt: I think it would take some additional language to cover the leased facilities so that it would be without question.

Id., at 13. At the end of this discussion, Mr. Schmidt agreed to provide to the committee some statutory language "to make sure that leased buildings, Post Office and otherwise, are going to be covered the same as Government-owned buildings." *Id.*, at 15. During the subsequent House debate on H.R. 6589, which then had been amended to include reference to federal leasing, Representative Gross asked if that language, subparagraph 2, would cover "the lease-purchase post offices presently being built throughout the country." Representative Gray responded: "I would say . . . that we did admonish the people downtown to go back and eliminate those barriers which are necessary if we already have the building under lease. And, if it is a new building to be leased, we make it mandatory that the provisions of this bill be carried out." 114 Cong. Rec. 17,431 (1968).

It is clear from these discussions that the Congress considered the question of leased buildings. It is also clear that they felt that the language did not clearly cover leased buildings. Accordingly, they added language which unmistakably included buildings to be leased by the federal government if such buildings were to be constructed or altered in accordance with plans and specifications of the United States. They went no further. Congress made no amendment to include buildings leased with grant or loan money if that money was not used to finance construction or alteration of the building.[10]

A review of the committee hearings, the committee reports and the floor debates reveals the overwhelming support for the goals of this Act. In the House report, for example, the committee stated: "If people who are physically handicapped are to rehabilitate themselves and seek gainful employment, it is vitally necessary that they have access to and are able to use buildings in which they work, visit, and reside in carrying on a normal life." H.R. Rep. No. 1532, 90th Cong., 2d Sess. 3–4 (1968). Representative Gray, after noting that H.R. 6589 had received "unanimous support from Members on both sides of the aisle," reminded his colleagues that the voluntary efforts of the federal agencies had fallen short and needed to be supplemented by minimum mandatory standards. 114 Cong. Rec. 17429–30 (1968). And the committees emphasized that the purpose of the Act was not to be circumvented by a narrow administrative interpretation of the word "building" by clearly stating their intent: "It is the intent of the committee that the word 'building' as used in this bill be given the broadest possible interpretation and include any structure which may be used by the general public, whether it be a small rest station at a public park or a multimillion-dollar Federal office building." H.R. Rep. No. 1532, 90th Cong., 2d Sess. 4 (1968); S. Rep. No. 538, 90th Cong., 1st Sess. 3 (1967). We believe that the conclusion reached here is consistent with and furthers legislative intent, although it is a more restrictive interpretation as to the number of structures to which the Act applies. In our opinion, the language directing a broad interpretation of the word "building" refers to the type of structure, not to the leasing or financing arrangement. The examples given in the sentence quoted above support this conclusion, as do excerpts from the congressional hearings. One witness, for example, urged that the definition of "building" be broad enough to include such buildings and facilities as national monuments, parking lots, and border immigration stations. House Hearings at 53 (statement of Heyward McDonald, Chairman, National Commission on Architectural Barriers to Rehabilitation of the Handicapped). In our opinion, it is clear from the statute and its legislative history that buildings leased with federal grant or loan funds are not covered by the Act.[11]

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[10] In 1976, subparagraph (2) of § 4151 was amended to delete the phrase "after construction or alteration in accordance with plans and specifications of the United States." Act of Oct. 18, 1976, § 201(1), 90 Stat. 2507. *See also* H.R. Rep. No. 1584—Part I, 94th Cong., 2d Sess. 12 (1976). The Act now includes within the meaning of the word "building," therefore, a building or facility "to be leased in whole or in part by the United States after August 12, 1968." 42 U.S.C. § 4151. Thus, it was not until 1976 that the Congress chose to include under the Act even those buildings leased directly by the federal government itself.

II.

The second issue raised also requires careful analysis of subparagraph (3) of § 4151. A building financed by a federal grant or loan is subject to the Act only if such building or facility is "subject to standards for design, construction, or alteration issued under authority of the law authorizing such grant or loan." 42 U.S.C. § 4151. The question presented here is whether applicability of the Act depends on actual issuance of the standards, or if the Act is applicable even if such standards, although authorized, have not been issued. The statutory language is ambiguous, and reasonable persons could interpret it differently. It does state that a structure is included only if it "is" (not "may be") subject to standards "issued" (not "issuable") under the authority of the law authorizing the grant or loan. On the other hand, it could be read to provide that a building is included if it is "subject" to standards issued under the law. That is, if the law authorizes standards to be imposed, the building could be considered to be "subject" to standards issued under the law in question.

The congressional intent underlying its language is difficult to discern. The phrase which imposes the condition that standards be issued did not appear in the Senate version of the bill, S. 222, or in the early House version. *See* H.R. 6589, 90th Cong., 1st Sess. (1967).[12] During the House hearings, concerns were expressed which may have caused the language in question to be added. Questions arose, for example, regarding the potentially overbroad definition of "public building." During the testimony of William A. Schmidt, a representative of the General Services Administration (GSA), Representative Waldie asked whether a local project financed primarily by local funds, but which also received generous federal subsidies, would fall within the purview of the legislation. House Hearings at 17. Neither Mr. Schmidt nor Representative Gray, Chairman of the Subcommittee, could answer the question. Representative Gray did state, however: "I doubt it seriously in this legislation. We only have jurisdiction over public buildings and grounds." *Id.* Mr. Schmidt then opined: "The bill is confined to public buildings as defined in the bill and would not cover federally subsidized public facilities." *Id.* Later, Representative Grover again raised the issue of the scope of the definition, suggesting that some restrictive language might be appropriate. *Id.* at 35. Representative Gray joined Representative Grover in his inquiry whether certain public buildings, included in the broad definition in the bill, properly would lie in another legislative jurisdiction. *Id.* For example, some federally assisted programs, such as Department of Agriculture construction programs, hospital construction, and airport construction, would lie with legislative committees other than the Committee on Public Works. Representative Denney suggested that the ambiguity could be obviated by deleting entirely the section of the definition which included buildings financed with grant or loan funds. *Id.,* at 36–37. This suggestion was criticized by subsequent witnesses who felt it substantially would weaken the bill. *Id.* at 53, 69, 91 (Statements of Heyward McDonald, William McCahill, and Representative James H. Scheuer).

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[11] The memorandum submitted to us by the ATBCB, which is responsible for enforcement of the Act, argues that the term "financed" includes leasing. Although the interpretation of the enforcing agency must be given due deference (*see* p. 17, *infra*), it should not be followed if it is clearly erroneous.

[12] As defined in those bills, the term "public building" included simply any building "financed in whole or in part with funds provided by a grant or loan made by the Federal Government, or any department or agency thereof after the date of enactment of this Act." The adjective "public" was later deleted.

These questions were not resolved during the hearings. Subsequently, the committee added the language in question, conditioning coverage of the Act on whether the building is subject to standards issued under the law authorizing the grant or loan. H.R. Rep. No. 1532, 90th Cong., 2d Sess. 1 (1968). It is possible that the language was intended to minimize potential legislative jurisdictional conflict by limiting imposition of accessibility standards to those situations in which the Congress specifically authorizes construction or design standards to be imposed.

The committee reports and the floor discussion of the bill provide little additional guidance on interpreting this section. The House report does suggest that standards actually must be imposed, by paraphrasing the language as follows: "[T]he committee amended the legislation to include any . . . building or facility . . . financed with funds provided by a Federal grant or loan, if the recipients are *required* by the basic legislation governing the grant or loan to adhere to regulations establishing standards for design, construction, and alterations. . . ." H.R. Rep. No. 1532, 90th Cong., 2d Sess. 3 (1968) (emphasis added). It can be inferred from remarks on the floor, however, that Congress assumed that the Act would apply to all construction for which standards *could* be imposed. Several speakers broadly stated that the bill was to reach all buildings without indicating that any discretion was left in the agencies. 114 Cong. Rec. 17,429–32 (1968) (remarks of Representatives Gray, Fulton, Matsunaga, and Bennett). If an agency has discretion as to whether to issue standards, then reading the Act to cover only those buildings for which standards have been issued leaves some discretion in the agencies. When Representative Gude asked Representative Gray, Chairman of the Subcommittee, if transit facilities were covered by the

Act, Mr. Gray unequivocally stated: "If constructed with Federal public funds such facilities would be covered." *Id.*, at 17,431.

When interpreting a statute, one may look for guidance to subsequent legislation which may reveal the intent of an earlier statute. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380–81 (1969). In 1970, as noted earlier, Congress amended § 4151 to include the Washington Metropolitan Transit Authority. Pub. L. No. 91-205, 84 Stat. 49 (1970). The law authorizing Washington Metro construction did not specifically provide that design standards were to be imposed, although the regional agency did have broad power to design, engineer, and construct the system. *See* National Capital Transportation Act of 1965, Pub. L. No. 89–173, § 3, 79 Stat. 664. The system was not, however, actually subject to standards for design issued under the Act. *See Design and Construction of Federal Facilities to be Accessible to the Physically Handicapped: Hearings on H.R. 14464 Before the Subcomm. on Public Buildings and Grounds of the House Comm. on Public Works,* 91st Cong., 1st Sess. 21 (1969).[13] According to the Senate report, this amendment was necessary because the transit authority was a regional agency formed by compact and not a Federal agency, and because "its buildings or structures are not subject to regulation for design, construction, or alteration issued under authority of the law authorizing Federal funds." S. Rep. No. 658, 91st Cong., 2d Sess. 2 (1970). This suggests that mere authorization may not be sufficient. The committee broadly stated, however, that it was the intent of the committee reporting the 1968 Act "that all buildings and structures which are to be used by the general public and are financed in whole or in part with Federal funds be designed and constructed so as to be accessible to the physically handicapped." *Id.* The House report stated that the 1968 Act "made it incumbent upon the Federal Government to insure that all public buildings constructed with Federal funds or constructed on behalf of the Federal Government be constructed in such a way that they are accessible to all people." H.R. Rep. No. 750, 91st Cong., 1st Sess. 1 (1969). The report also stated coverage of the Act was in doubt "[b]y virtue of the unique Federal-State relationship created through the [transit] compact" and implied that the amendment resolves doubt as to the applicability of the Act to mass transit facilities. *Id.*, at 2.

In 1973, the Department of Transportation requested an opinion from the General Services Administration on the applicability of § 4151 to grants and loans to state and local communities by the Urban Mass Transportation Administration for the construction and alteration of mass transit facilities under § 3 of the Urban Mass Transportation Act of 1964, 49 U.S.C. 1602. Section 3 authorizes the Secretary of Transportation to make loans or grants to assist in construction of mass transportation facilities "on such terms and conditions as he may prescribe." The GSA concluded that § 4151 is applicable to grants and loans for construction and alteration of buildings and facilities of that kind, if the authorizing legislation is interpreted to permit loans and grants to be subject to design and construction standards.[14] The General Counsel of GSA relied heavily on the 1970 amendment concerning the Washington Metro System, and on the instruction in the legislative history of the Act that the word "building" be broadly interpreted.

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[13] At the outset of the hearings, Representative Gray, Chairman of the Subcommittee, stated that the legislation became necessary "when we found the original legislation did not include rolling stock." Hearings, at 4. The testimony at the hearings centered on the Act's application to mass transportation systems in general, not on the question of federal imposition of general design standards.

This has also been the interpretation of the ATBCB, which in 1973 was given responsibility for enforcing the Act. The Board's proposed regulations provided that the term "building" includes any building financed by a grant or loan if such building "may be" subject to standards for design, construction, or alteration. 41 Fed. Reg. 23,596 (1976). In the final regulations, "may be" was changed to "is," but the Board made clear in its comments that this change was not a change in its interpretation of the statute. It wrote:

> The term "building," § 1150.2(d), has also been revised by deleting the phrase "may be" in (iii) and substituting the word "is" in lieu thereof. One Federal commentator felt that the proposed language might be construed as a substantive change. That was not intended and the change has been made to more closely follow the definition of "building" in Pub. L. No. 90-480. This does not effect any change in interpreting the statute. *See* Opinion of General Counsel, General Services Administration, "First Report of the Architectural and Transportation Barriers Compliance Board" at pages 49-50.

41 Fed. Reg. 55,442 (1976). This has been the consistent interpretation of the Board since it was established.

When a statute has been officially interpreted by those agencies charged with its administration and enforcement, such interpretations must be given due deference. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Udall* v. *Tallman*, 380 U.S. 1, 15 (1965); *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). Generally, reasonable interpretations of such agencies are not to be rejected simply because alternative interpretations may be advanced. *Miller* v. *Youakim*, 440 U.S. 125, 144 (1979); *Train* v. *Natural Resources Defense Council, Inc.*, 421 U.S. 60, 87 (1975). In our opinion, the interpretations advanced by GSA and ATBCB are not unreasonable and, for this reason, we conclude that the term "building" covers those buildings or facilities financed by federal grants or loans if the law authorizing the grant or loan also authorizes the issuance of standards for design, construction, or alteration,[15] even if, in its discretion, the agency chooses not to issue such standards.[16]

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[14] The letter stated: "Since the applicability of (the Act) is not dependent upon the exercise of discretionary authority by the agency, we also conclude that the Act is applicable, notwithstanding the fact that UMTA, as a matter of policy, may determine not to make such loans and grants subject to design and construction standards not related to the handicapped." (Opinion letter of the General Counsel, GSA (February 14, 1973)).

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

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[15] We interpret the phrase "standards for design, construction, or alteration" as referring to architectural standards in general, not to accessibility standards in particular.

[16] In reaching the opposite conclusion, HEW argues that the Board's construction raises due process problems because of lack of notice to the program recipients. We do not think the statute is unconstitutionally vague, particularly when the agencies responsible for administering and enforcing the Act officially have taken a consistent position for seven years. A statute is not unconstitutionally vague because it may be ambiguous or open to two constructions. *Williams* v. *Brewer*, 442 F.2d 657, 660 (8th Cir. 1971). It is the responsibility of the Board and the granting agencies to see that recipients are informed of and comply with the Act.

Disclosure of Court-Authorized Interceptions of Wire Communications to Congressional Committees

An officer of the Department of Justice may disclose tapes of court-authorized interceptions of wire communications to congressional committees without a court order, as long as such disclosure is appropriate to the proper performance of his official duties.

Generally, providing Congress with information in order to help facilitate its constitutionally mandated legislative role is part of the legal obligation of the Executive Branch; however, it is also the Executive's responsibility to determine when such disclosure would impede its performance of other responsibilities, and thus be inappropriate.

May 12, 1980

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

I am responding to your memorandum concerning the dissemination to the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs of tapes of court-authorized interceptions of wire communications. In a January 9, 1980, letter to Deputy Assistant Attorney General Irvin B. Nathan, the subcommittee's chief counsel, Marty Steinberg, requested such tapes dealing with "organized crime, labor racketeering, and narcotics trafficking." We conclude, as explained below, that this Department is empowered under Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. § 2510 *et seq.*, to disclose tapes of court-authorized interceptions of wire communications in response to a proper request or demand by a congressional committee unless, in the Department's judgment, such disclosure would be improper because of our duty faithfully to execute the criminal laws.

Ordinarily, this Department is empowered to respond to proper requests for information from congressional committees, unless such information is privileged or protected by a statutory restriction upon executive agency disclosure. The only applicable statutory restriction of which we are aware in this instance is 18 U.S.C. § 2515, which provides:

> *Whenever any wire or oral communication has been intercepted, no part of the contents of such communication* and no evidence derived therefrom *may be received in evidence in any* trial, hearing, or other *proceeding in or before any*

> court, grand jury, department, officer, agency, regulatory body, *legislative committee*, or other authority of the United States, a State, or a political subdivision thereof *if the disclosure of that information would be in violation of this chapter* [*i.e.,* Title III]. [Emphasis added.]

Section 2515 is not an absolute, but a conditional limitation on disclosure. If disclosure is otherwise authorized by Title III, it is not prohibited by § 2515.

The authority to disclose intercepted wire communications appears in 18 U.S.C. § 2517. Subsection (2) of that section provides:

> Any investigative or law enforcement officer who, by any means authorized by this chapter, has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom may use such contents to the extent such use is appropriate to the proper performance of his official duties.

Because the proper performance of the official duties of Department personnel includes responding to proper requests and demands of congressional committees, the plain language of this subsection would appear to authorize the disclosure in question.

Your Division suggests that § 2517(2) might not authorize disclosures to congressional committees, but might be limited to disclosures in connection with "actual criminal investigations and prosecutions." Although the language of the Senate report explaining § 2517(2) illustrates its coverage only with examples that would be so limited, S. Rep. No. 1097, 90th Cong., 2d Sess. 99–100 (1968), we do not believe such a limitation should be inferred from the statute.

As originally drafted by Professor G. Robert Blakey, the section that was to become § 2517 included language substantially similar to the section eventually enacted, but included also the following section:

> (d) The contents of any wire or oral communication or evidence derived therefrom intercepted in conformity with this Chapter may otherwise be disclosed only upon a showing of good cause before a judge of competent jurisdiction.

Blakey, G. R., "Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis," *reprinted in* President's Commission on Law Enforcement and Administration of Justice, *Task Force Report: Organized Crime Annotations and Consultants' Papers* 109 (1967). It is certain from Professor Blakey's discussion that he viewed disclosures to legislative committees as included within his subsection (d), and thus contingent upon a judicial finding of good cause. *Id.* at 103–04.

Subsection (d), however, was omitted from S. 675, 90th Cong., 1st Sess. (1967), which became Title III of the bill eventually enacted as the Omnibus Crime Control and Safe Streets Act of 1968. We have found no discussion of this omission in the legislative history of S. 675 or Title III, but its impact would logically have to lead to one of the following interpretations. Either Congress, like Professor Blakey, intended subsections (1)–(3) to confer disclosure authority only with respect to specific criminal proceedings and to eliminate any disclosure authority outside that context, or Congress intended to permit disclosures to Congress to be made without a court order under subsection (2), so long as the disclosures would be within the proper performance of an investigative or law enforcement officer's legal duties.

For three reasons, we conclude that the latter interpretation is more reasonable. First, the legislative history contains no suggestion that Congress intended to protect intercepted communications from proper disclosures to congressional committees. Second, Congress ordinarily does not protect Executive Branch information in this way, *cf.*, 5 U.S.C. § 552a(b)(9). Third, providing Congress with information in appropriate instances in order to help facilitate its constitutionally mandated legislative role is part of the legal obligation of the Executive Branch to help achieve a mutual accommodation of the two branches' functional needs for information. *U.S.* v. *American Telephone and Telegraph Co.*, 567 F. 2d 121 (D.C. Cir. 1977). We should not lightly assume that Congress has proscribed our participation in what otherwise would be a constitutionally mandated effort at cooperation.[1]

It should be noted that, although § 2517(2) authorizes the use of the contents of intercepted communications "to the extent such use is appropriate to the proper performance of [the] official duties" of an investigative or law enforcement officer, this section does not require automatic compliance with the requests of legislative committees and, on its face, mandates a finding by a disclosing officer that the requested disclosure would be "appropriate to the proper performance of . . . official duties." There are foreseeable circumstances in which the disclosure to congressional committees of the contents of intercepted communications would impede Departmental performance of other official duties, *e.g.*, by compromising ongoing investigations or divulging the identities of informants. Because the faithful execution of the criminal laws and the protection of the constitutional rights of potential defendants requires this Department to avoid disruptions in the orderly handling of cases, we conclude that the Department might reasonably determine that disclosures to Congress, in certain cases, would not be "appropriate to the proper performance of . . . official duties." In sum, the proper exercise of authority under this section requires a balancing of responsibilities, and the Department may, as appropriate, comply with or decline committee requests for the contents of intercepted communications.

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[1] The Criminal Division also suggests that the scope of "official duties" as that phrase is used in § 2517(2) perhaps should be read as comprising only duties in connection with criminal actions because Congress, when it subsequently wished to accommodate the disclosure of wiretap information in civil actions, amended § 2517(3), rather than regarding such disclosures as within the proper performance of a law enforcement officer's official duties. Subsection (3) as first enacted in 1968, however, expressly pertained to testimony in criminal actions and, absent the later amendment, the omission in that subsection of any reference to civil actions might have precluded an assumption that such actions were covered by § 2517(2). The original limitation of § 2517(3) to criminal actions, however, would not have precluded an interpretation of § 2517(2) comprising nonadjudicatory proceedings, *e.g.*, congressional hearings. On the different uses of information in legislative and adjudicatory contexts, *see, Senate Select Committee on Presidential Campaign Activities* v. *Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974).

LARRY A. HAMMOND
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Department of Justice Views on the Bumpers Amendment to the Administrative Procedure Act

[The following letter to the Chairman of the House Judiciary Committee, initially drafted in the Office of Legal Counsel at the request of the Assistant Attorney General for Legislative Affairs, presents the Department of Justice's views on amendments to the Administrative Procedure Act's (APA's) provisions for judicial review of agency action proposed by Senator Bumpers. In essence, the so-called Bumpers amendment sought to achieve greater congressional control over federal agency actions by giving the federal courts broad and relatively undefined new powers in reviewing agency rules. The letter points out that the proposed amendments to the APA would transfer to the federal courts responsibility for making policy choices now made by agencies, and that they would disrupt the regulatory process in major and unforeseeable ways.]

May 13, 1980

THE CHAIRMAN OF THE COMMITTEE ON THE JUDICIARY OF
THE HOUSE OF REPRESENTATIVES

MY DEAR MR. CHAIRMAN: This presents the Department of Justice's views regarding the so-called Bumpers amendment to the Administrative Procedure Act's (APA's) provisions for judicial review of agency action, as recently revised with the approval of Senator Bumpers. The revised amendment would eliminate any "presumption of validity" that a reviewing court might accord agency action, except when a rule is to be relied upon as a defense, such as by private parties, in civil or criminal actions. It would amend 5 U.S.C. § 706(2)(C) by requiring a court, when agency action is challenged as in excess of statutory jurisdiction, authority or limitation or short of statutory right, to determine that the action is authorized "expressly" or by "clear implication" in the statute or "other relevant legal materials." Finally, it would amend 5 U.S.C. § 706(2)(E) by making the "substantial evidence" test applicable to all informal rulemaking conducted pursuant to 5 U.S.C. § 553 and all adjudications under 5 U.S.C. § 554.

These provisions would constitute substantial alterations in existing principles governing judicial review of agency action and, in our view, would have seriously destabilizing effects on administrative law. They would not, in our view, satisfy the purposes they are said to serve, and they would have major counterproductive consequences, which would include making the administrative process more confused and prone to delay than it already is. By prompting more and more complex litigation regarding agency action, they would also impose significant burdens on already overburdened courts.

At bottom, the provisions rest on a contradiction. They are put forward as a response to a perception that agencies should be more politically accountable to Congress and hence the people, but in fact they would replace the agencies with federal judges, members of the branch of government which is constitutionally immune from the ordinary methods of political accountability that control the exercise of discretion under law. We doubt that there is any reason to assume, as the Bumpers amendment does, that the judiciary's conclusions on complex policy choices arising in administrative proceedings will necessarily be seen by Congress as more "correct" than those of agencies. It may be anticipated that in the future, as in the past, courts will determine in various cases that agencies should have imposed regulatory requirements more rigorous or otherwise different from those they have imposed. *Cf. Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672 (1954); *Natural Resources Defense Council, Inc.* v. *Costle,* 568 F.2d 1369 (D.C. Cir. 1977). If Congress wishes to make agencies more accountable to its will, it can do so directly, such as by more detailed substantive legislation or oversight hearings. To seek to do so indirectly by giving broad, new powers and duties to courts is to risk jeopardizing basic values of democratic governance, according to which Congress, not the courts, should assume primary responsibility for determinations affecting public policy.

We will focus on the three main aspects of the revised Bumpers amendment.

I. The "Presumption of Validity"

The revised amendment would provide that a reviewing court shall make determinations about a rule "without according any presumption of validity" to any rule, except where a rule is set up as a defense, such as by a private party, to a civil or criminal action.

This provision is said to be designed to prevent "blind or automatic" judicial deference to agency rules. However, it is incorrect as an empirical matter to suggest that courts blindly defer to agencies. The courts can and do "speak the final word on interpretation of law, both constitutional and statutory." [1] As to matters involving an admixture of factual and policy issues, the Supreme Court has plainly instructed lower federal courts to subject agency rules to a "searching and careful" and "thorough, probing, in-depth review." *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402, 415–16 (1971). The lower federal courts have heeded such directions by carefully and thoroughly reviewing agency rules.[2]

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[1] Report of the Attorney General's Committee on Administrative Procedure, *Administrative Procedure in Government Agencies,* S. Doc. No. 8, 77th Cong., 1st Sess. 78 (1941) (hereinafter cited as Report of the Attorney General's Committee). *See Volkswagenwerk* v. *FMC,* 390 U.S. 261, 272 (1968); *Morton* v. *Ruiz,* 415 U.S. 199, 237 (1974).

Although the phrase "presumption of validity" is undefined, it might be said to encompass a wide variety of doctrines under which courts reasonably give weight to agency determinations in view of the agency's specialized experience, familiarity with the underlying statutes and immersion in day-to-day administrative operations that reveal practical consequences of different courses of action.[3] If this be its meaning here, then its elimination from the law would be senseless and dangerous in terms of its implications for the respective roles of courts and agencies.

For instance, it is rational for courts to defer to an agency's interpretation of its own statute, barring contrary indication in the legislative record, because agencies have specialized knowledge and exposure pertinent to the process of properly construing their organic acts. *See, e.g., NLRB* v. *Seven-Up Bottling Co.,* 344 U.S. 344, 349 (1953); *Wilderness Society* v. *Morton,* 479 F.2d 842, 866 (D.C. Cir.) (en banc), *cert. denied,* 411 U.S. 917 (1973). Further, it bears noting that historically agencies have been established in order to gain for society the benefits of expert, specialized decisionmaking on complex issues of policy.[4] It would be inconsistent to rely on such bodies without permitting courts, in the context of reviewing agency rules, to ascribe to agency determinations a presumption of validity in appropriate circumstances. There are, as Judge Learned Hand noted, issues as to which an agency's "specialized experience equips it with major premises inaccessible to judges." *NLRB* v. *Universal Camera Corp.,* 190 F.2d 429, 430 (2d Cir. 1951). It would also be inappropriate in a democratic system to permit courts to substitute their policy preferences for those of agencies. Since the notion that courts in appropriate cases can accord agency views a presumption of validity is both a basic tool of rational judicial decisionmaking and a bulwark against usurpation by the judiciary of the policy-making role of agencies, its elimination would promise to be significantly counterproductive.[5]

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[2] *See, e.g., Katharine Gibbs Sch.* v. *FTC* 612 F.2d 658 (2d Cir. 1979); *Ethyl Corp.* v. *EPA,* 541 F. 2d 1 (D.C. Cir.) (en banc), *cert. denied,* 426 U.S. 941 (1976). Indeed, if courts were not carefully reviewing rules, as we believe they are, then it would be unrealistic at the outset to suppose that courts could be a reliable means of preventing agency "excess." But the Bumpers amendment presumes that courts should be relied on to prevent such "excess." There is thus a deep incoherence in the argument for the amendment: it asserts (wrongly, in our view) that courts blindly defer to agencies, and it would seek to rely on courts (inappropriately, in our view) to remedy the problem of agency "excess."

[3] *See generally* Woodward & Levin, *In Defense of Deference: Judicial Review of Agency Action,* 31 Ad. L. Rev. 329, 331-35, 337-38 (1979).

[4] *See* J. Landis, The Administrative Process (1938). *See also* Report of the Attorney General's Committee, note 1 *supra,* at 77: "[W]e expect judicial review to check—not to supplant—administrative action. Review must not be so extensive as to destroy the values—expertness, specialization, and the like—which . . . were sought in the establishment of administrative agencies."

[5] It is no response to suggest that legal issues can be distinguished from "fact" and "policy" issues, and that only the first set of issues would be affected by the elimination of any presumption of validity of rules. It has been long recognized that there is no such "fixed distinction" in administrative law, *see, e.g.,* Dickinson, Administrative Justice and the Supremacy of Law 55 (1959), for many issues subsume legal, factual, and policy questions.

Its elimination would also undermine necessary certainty and stability in the law. An agency rule would need only to be challenged in court to lose its status as presumably valid until found otherwise. The products of federal agencies thus would be unreasonably denied the basic protection normally accorded most acts of individuals and groups, namely, the assumption that until proven otherwise, actors in society will be presumed to have behaved legally.

II. "Express" or "Clear" Authority for Agency Action

The revised Bumpers amendment would provide that whenever agency action is challenged as not authorized by statute, the reviewing court must determine that it is authorized "expressly" or "by clear implication" in view of the statutory language and "other relevant legal materials."

This provision is said to be a means of preventing excursions by agencies beyond their statutory bounds. However, that purpose is already served by existing standards of judicial review, which require a court to set aside agency action found to be in excess of statutory jurisdiction, authority or limitations, or short of statutory rights. *See* 5 U.S.C. § 706(2)(C). Accordingly, there is no need to alter existing law to further the aim claimed for this provision, at least with respect to standards of judicial review.

Also, the proposed language raises the possibility that courts, in reviewing agency action, could be unable to use the flexible tools of statutory construction that have evolved as the necessary concomitants of broad delegations to agencies. For instance, if a statute does not explicitly anticipate a particular problem that arises in its implementation, and if the legislative history is silent on the point in issue—as happens not infrequently—a court would likely inquire whether the agency action is consistent with and "reasonably related to the purposes of the enabling legislation. . . ." *Thorpe* v. *Housing Authority of the City of Durham,* 393 U.S. 268, 280–81 (1969); *See Mourning* v. *Family Publications Service, Inc.,* 411 U.S. 356, 369 (1973). It might be argued that, under the proposed language, such a perfectly appropriate judicial inquiry would be barred by the requirement that agency action be authorized "expressly" or by "clear implication," whatever those terms may precisely mean. Such an argument fails to recognize that under statutes conferring broad powers on agencies, agencies often must assess widely competing values, interests or other factors in light of the law, and frequently a given statute cannot plausibly be construed "clearly" to authorize or require one specific result of such a particularistic, policy-laden assessment.

In addition, the free-wheeling use by courts of a "clear implication" or "clear statement" doctrine, such as reflected in the proposed language, could represent a dangerous arrogation by the courts of the policy-making discretion that Congress has delegated to agencies.

III. The "Substantial Evidence" Standard

The revised Bumpers amendment would amend the APA by making the "substantial evidence" standard applicable to all rulemaking and adjudication, even if they are not required by statute to be conducted on the record after opportunity for an agency hearing. Under the APA, the substantial evidence standard only applies to formal "on the record" decisionmaking, which usually involves a trial-type hearing. *See* 5 U.S.C. §§ 556, 557 & 706(2)(E).

This proposal rests on the mistaken premise that a higher standard of review of factual issues than that afforded by the "arbitrary and capricious" standard of review is needed. In fact, courts aggressively review factual issues arising in informal rulemaking under the arbitrary and capricious standard.[6] There is simply no demonstrated need to alter the present standard in order to prompt careful and searching judicial review.

Although the term "substantial evidence" is not a talismanic phrase of determinate meaning,[7] it involves, under the APA, a review of the whole record underlying the agency action. *See Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 488 (1951). Informal rulemaking is not required to have any "record" encapsulating all the evidence on which a decision is based. At the most basic level, then, it is difficult to understand how a "substantial evidence" standard could be used across the board with respect to all informal rulemaking.[8]

Also, many, if not most, of the crucial determinations pertinent to informal rulemaking are of a general policy nature, and do not turn on the existence or nonexistence of specific "facts" so much as they turn on the evaluation of probabilities, the balancing of objectives and the selection of methods to achieve given ends within statutory limits. It would be erroneous to assume that such decisions can be easily assimilated into a model of review designed especially for factual questions aired and tested in "on the record" proceedings. One could expect considerable confusion about the way in which any "substantial evidence" standard should apply with respect to such issues in informal rulemaking.

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[6] *See, e.g., South Terminal Corp.* v. *EPA*, 504 F.2d 646, 671–76 (1st Cir. 1974); *State of Texas* v. *EPA*, 499 F.2d 289, 297 (5th Cir. 1974). *See also Union Oil Co. of Cal.* v. *FPC*, 542 F.2d 1036, 1041–44 (9th Cir. 1976).

[7] *See Associated Industries of New York State, Inc.* v. *U.S. Dept. of Labor*, 487 F.2d 342, 349 (2d Cir. 1973).

[8] *See* S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 195 (1979) ("Since it presumes review on the basis of all of the relevant evidence, the substantial evidence standard in any event would be inappropriate in informal decision-making, which does not generate a trial-type record containing all of the relevant evidence.").

Also, one could expect confusion about the proper procedures that should be used to generate a "record" subject to review under a substantial evidence standard. At a minimum, agencies likely would move toward more formalized procedures in order to guard against possible adverse rulings by courts that the record was insufficient or improperly compiled.[9] This would make the administrative process slower and less efficient, the opposite of the results said by proponents of the Bumpers amendment to be sought. This would also make not only regulation but also *de*-regulation harder and more costly, further interposing counterproductive tendencies in the administrative process.

It is not a sufficient response to note that in some statutes, Congress has applied a substantial evidence standard to rulemaking not involving the full procedural formalities under 5 U.S.C. §§556 & 557. First, in such statutes, Congress has addressed the issue of what other than notice-and-comment procedures are required, thereby helping to obviate what would be one of the central confusions flowing from this proposal. Further, it simply does not follow from the fact that Congress has applied a substantial evidence standard to certain "hybrid" procedures, that the standard should be applied to all informal rulemaking. Even in the context of particular statutes, the combination of "hybrid" procedures and a substantial evidence test has contributed to confusion and an "absence of statutory harmony with respect to the nature and scope of review." *Associated Industries* v. *Dept. of Labor, supra* n. 7, 487 F.2d at 345. This sort of confusion would be multiplied should this proposal, imposing a higher standard of review without consideration of its appropriateness in a particular substantive context and without giving any attention to attendant procedural requirements under specific statutes, be adopted.

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[9] *See Industrial Union Dept., AFL–CIO* v. *Hodgson*, 499 F.2d 467, 474 (D.C. Cir. 1974). *But see Vermont Yankee Nuclear Power Co.* v. *Natural Resources Defense Council*, 435 U.S. 519 (1978). *Compare, Mobil Oil Corp.* v. *FPC*, 483 F.2d 1238 (D.C. Cir. 1973), *with Phillips Petroleum Co.* v. *FPC*, 475 F.2d 842, 851–52 (10th Cir. 1973), *cert. denied sub nom. Chevron Oil Co., Western Division* v. *FPC*, 414 U.S. 1146 (1974).

V. Conclusion

We believe that the revised Bumpers amendment, like the original Bumpers amendment, is an inappropriate means for achieving the desired goals of reforming the administrative process. Both would predictably prompt substantial counterproductive consequences. Both would upset long-established legal principles and foster basic confusion in administrative law while complicating and delaying the implementation and enforcement of statutes.

Sincerely,
ALAN A. PARKER
Assistant Attorney General
Office of Legislative Affairs

Emergency Authority of the Secretary of Health and Human Services Under 42 U.S.C. § 243(c)(2)

Under § 311 of the Public Health Service Act, 42 U.S.C. § 243(c)(2), which authorizes the Secretary of Health and Human Services, at the request of the appropriate state or local authority, to extend temporary assistance to states and localities in meeting health emergencies, the Public Health Service may provide relocation assistance to residents living near the Love Canal for a period not to exceed 45 days, for purposes of assessing and dealing with the health emergency in that area.

May 17, 1980

MEMORANDUM OPINION FOR THE ASSISTANT TO THE PRESIDENT FOR INTERGOVERNMENTAL AFFAIRS

This responds to your request for our opinion whether the Secretary of Health and Human Services is authorized by 42 U.S.C. § 243(c)(2) to assist state and local authorities in temporarily relocating certain residents who now live near the Love Canal in Niagara Falls, New York, to cities removed from health hazards of the Canal.[*] In our opinion, this section does give the Secretary that authority.

The section in question was enacted in 1967 as an addition to § 311 of the Public Health Service Act. Partnership for Health Amendments of 1967, Pub. L. No. 90–174, § 4, 81 Stat. 533, 536 (1967). As enacted, the statute provided:

> The Secretary may enter into agreements providing for cooperative planning between Public Health Service medical facilities and community health facilities to cope with health problems resulting from disasters and for participation by Public Health Service medical facilities in carrying out such planning. *He may also, at the request of the appropriate State or local authority, extend temporary (not in excess of forty-five days) assistance to States or localities in*

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[*] NOTE: Love Canal, an uncompleted excavation originally designed to link the Niagara River and Lake Ontario, was used as a chemical dumpsite between 1920 and 1953. During the 1970's, homes bordering the landfill began to smell of chemicals, and residents of the area were found to be suffering unusually high rates of cancer, birth defects, and other illnesses. In 1978, an investigation by the New York State Departments of Health and Environmental Conservation led to the discovery that the landfill was leaking dangerous chemical compounds, and the area was declared by the State to be "an extremely serious threat to health and welfare." On May 21, 1980, President Carter signed an emergency order authorizing federal assistance in the temporary relocation of the 710 families who had remained in the area. Ed.

> ***meeting health emergencies of such a nature as to warrant Federal assistance.*** The Secretary may require such reimbursement of the United States for aid (other than planning) under the preceding sentences of this subsection as he may determine to be reasonable under the circumstances. Any reimbursement so paid shall be credited to the applicable appropriation of the Public Health Service for the year in which such reimbursement is received.

Id. (Emphasis added). In 1976, the section was amended to authorize the Secretary to develop and implement a plan to use resources of the Public Health Service and other agencies under the Secretary's jurisdiction to control epidemics and to meet other health emergencies. National Consumer Health Information and Health Promotion Act of 1976, Pub. L. No. 94–317, § 202(b), 90 Stat. 695, 703 (1976). The 1976 amendment divided § 243(c) into two parts. Section 243(c)(1) authorized the development and implementation of plans to meet emergencies or problems resulting from disasters or epidemics. Section 243(c)(2), which sets forth the Secretary's authority to extend assistance to states or localities in meeting health emergencies, is the section which grants the authority about which you have inquired. This section now provides:

> The Secretary may, at the request of the appropriate State or local authority, extend temporary (not in excess of forty-five days) assistance to States or localities in meeting health emergencies of such a nature as to warrant Federal assistance. The Secretary may require such reimbursement of the United States for assistance provided under this paragraph as he may determine to be reasonable under the circumstances. Any reimbursement so paid shall be credited to the applicable appropriation for the Service for the year in which such reimbursement is received.

Id. The 1976 amendment did not substantively change the Secretary's authority respecting temporary health emergency assistance to states or localities.

To determine the scope of the Secretary's authority under this section, we have reviewed the legislative history of both the 1967 and the 1976 Acts. This review yielded little guidance as to the meaning of the operative phrases in the statute, such as the 45-day limitation on assistance. There is also little indication of the legislative intent as to what may satisfy the requirement of a request from "the appropriate State or local authority" or as to what type of health emergency was contemplated. We found nothing in this review to indicate that the Secretary may not extend federal assistance for relocating Love Canal residents to temporary housing.[1]

The 1967 amendment, which added the section authorizing the Secretary to act in health emergencies, was part of a lengthy bill which modified the Public Health Service Act. The House Committee on Interstate and Foreign Commerce explained the new section as follows:

> This section adds a new subsection (c) to section 311 of the Public Health Service Act. Under this proposed new subsection, the Secretary would be authorized to enter into agreements providing for cooperative planning between public health medical facilities and community health facilities to cope with health problems resulting from disasters, and for participation by Public Health Service medical facilities in carrying out such planning. *He could also, at the request of appropriate State or local authority, extend temporary (not in excess of 45 days) assistance to States or localities in meeting health emergencies of such a nature as to warrant Federal assistance.* He could also require such reimbursement of the United States for aid (other than planning) received under this subsection as he determines to be reasonable under the circumstances. Any such reimbursement would be credited to the applicable appropriation of the Public Health Service.[2]

H.R. Rep. No. 538, 90th Cong., 1st Sess. 38 (1967) (emphasis added). The reference to the new section in the Senate report indicates that the Congress intended the section to grant broad authority to the Secretary so that the Public Health Service could play an active role in delivering disaster assistance services. In explaining this expanded role, the committee wrote:

> Under present statutory authority, the Public Health Service may provide emergency care and treatment in its hospitals and outpatient facilities to persons who are not legal beneficiaries of the Service, but the Service does not have clear authority to provide such emergency care or treatment outside of its own facilities. If Public Health Service hospitals are to be responsible members of the medical communities in which they are located, they must be able to play a more active role in meeting such community emergency health needs as arise in the case of floods, fires, and other disasters. The proposed new au-

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[1] There are no judicial decisions or regulations interpreting this section.

[2] The Secretary must determine whether to require reimbursement from the state or locality. In 1967, it was suggested to the committee that the reimbursement be mandatory, but this suggestion was not followed. *See* H.R. Rep. No. 538, 90th Cong., 1st Sess. 49 (1967).

> thority would not create any direct Federal obligation to provide such emergency assistance, but it would authorize Public Health Service medical facilities to cooperate with other community agencies in the development and execution of disaster assistance services.

S. Rep. No. 724, 90th Cong., 1st Sess. 13 (1967). Although this reference could be read to suggest that the section authorizes only emergency assistance in the form of assistance by Public Health Service facilities, we do not believe the section properly should be construed so narrowly. In its section-by-section analysis, the committee noted that § 4 authorized agreements for cooperative planning between public health medical facilities and community health facilities *and* that the Secretary could also extend temporary assistance to meet health emergencies. There is no limitation on the type of temporary assistance that may be provided. *See* S. Rep. No. 724, 90th Cong., 1st Sess. 25 (1967).[3]

Most of the discussion on the floor focused on other, more controversial sections of the bill. The few comments on § 4 simply refer to the strengthened role of the Public Health Service in assisting states and localities to cope with health emergencies and disasters. *See, e.g.,* 113 Cong. Rec. 26,016 (1967) (Statement of Mr. Donohue). Hearings on the bill were held by the Senate Committee on Labor and Public Welfare. As with the floor debates, the few comments on § 4 at the hearings summarily referred to the section as a clarification and strengthening of existing authority for assistance to states and localities. *See, e.g., Partnership For Health Amendments of 1967: Hearings on S. 1131 and H.R. 6418 Before the Subcomm. on Health of the Sen. Comm. on Labor and Public Welfare,* 90th Cong., 1st Sess. 62 (1967).

The 1976 amendment, as stated earlier, did not substantively modify the Secretary's authority to assist during emergencies. The amendment to § 4 appeared in the House bill. The committee simply paraphrased the existing provision in its report, without shedding any light on the meaning of the section. H.R. Rep. No. 1007, 94th Cong., 2d Sess. 30 (1976).

The plain language of the statute authorizes the Secretary to provide the assistance at the request of the appropriate state or local authority. This request is a prerequisite to the provision of any assistance. The Secretary must determine whether the authority requesting the aid is the appropriate authority.[4] The Secretary must determine whether the circumstance is a health emergency of such a nature as to warrant federal assistance.[5] Once the Secretary makes this determination, temporary federal assistance may be provided for a period of 45 days. The legislative sources cited above do not reveal the purpose of the 45-day limitation. Because the purpose of the section is to authorize temporary assistance to states and localities, it may be inferred that the provision was added to prevent prolonged federal involvement. Financial commitments may not be made beyond the 45-day period. If the financial commitments are made within the 45-day period, and if they are intended to provide "temporary" aid, we believe the section allows the benefits of the commitments to extend beyond the 45 days.

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[3] A conference committee was convened to resolve differences on other portions of the bill. The conference report does not discuss this section. H.R. Rep. No. 974, 90th Cong., 1st Sess. (1967).

[4] Although the Act states that "*the*" state or local authority may make the request, we do not think this means that there is only one official so authorized. In the absence of regulations, the Secretary must determine in each circumstance whether the request comes from an appropriate authority.

Finally, based upon our review of the statute and its legislative history, as discussed above, at least in the circumstances as you have described them in the case, the Public Health Service is authorized to provide temporary relocation assistance. Any removal of families, and their temporary relocation in other housing, will be for purposes closely related to assessing and dealing with the health emergency. Congress intended to confer on the Secretary of Health and Human Services authority broad enough to respond as contemplated here.

LARRY A. HAMMOND
Acting Assistant Attorney General
Office of Legal Counsel

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[5] We have been advised by the General Counsel's Office of the Department of Health and Human Services that a standard internal operating procedure requires that the Surgeon General determine that there is indeed a "health emergency." The statute itself does not require this procedure, and the process is not set forth in the Public Health Service's regulations.

Use of Military Personnel to Maintain Order Among Cuban Parolees on Military Bases

The prohibition in the Posse Comitatus Act, 18 U.S.C. § 1385, against using military personnel to execute the law, was not intended to restrict the military's ability to maintain order among civilians on its own reservations.

Military personnel may take any steps deemed by the base commander to be reasonably necessary to ensure that Cuban parolees housed on a military base do not breach the peace of the base, and may restrict them to areas of the base specifically designated for their use; however, any claim of a parolee of a legal right to depart the base should be evaluated by non-military law enforcement personnel.

May 29, 1980

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds to your request for our opinion whether, consistent with the Posse Comitatus Act, 18 U.S.C. § 1385, military personnel may be used to maintain law and order among the Cubans paroled into the United States and housed at various United States military bases, awaiting processing under the Immigration and Nationality Act and the Refugee Act of 1980. The answer to your question turns on general principles which this Department and the courts have considered over the years. Based upon this prior consideration, as set forth below, I conclude that the Posse Comitatus Act does not prohibit military commanders from directing the use of military personnel to maintain order among the Cuban parolees while on military bases.

Arrangements have been made for the Cuban parolees to be temporarily housed on three military bases: Fort Chaffee in Arkansas, Fort Indiantown Gap in Pennsylvania, and Eglin Air Force Base in Florida.[1] While the physical arrangements which have been made at each base differ in detail, certain features are common to all three. In each case, an area within the military reservation has been set aside for the parolees, and certain base facilities and supplies have been made available for their use while there. The area set aside has been cordoned off,[2] and the parolees are not authorized to enter other areas of the base except as the commanding officer may direct. At Fort Chaffee and at Indiantown Gap, the parolees are being housed in military barracks; at Eglin, temporary shelters of wood and canvas have been specially constructed.

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[1] The use of military facilities has been arranged by the Federal Emergency Management Agency (FEMA), under authority of § 302(a) of the Disaster Relief Act Amendments of 1974, Pub. L. No. 93-288, 93d Cong., 2d Sess., 88 Stat. 143.

[2] At Eglin AFB a fence has been erected to surround the area in which the Cubans are being housed; at Fort Chaffee and at Indiantown Gap, the boundaries of the reserved area are marked only by sawhorses and ropes.

At all three bases, military personnel have been sharing responsibility for the welfare of the parolees with state and federal civilian law enforcement and disaster relief personnel. Questions have been raised, however, as to the nature and extent of participation which may properly be expected of the military in this connection.

Historically, the commander of the military installation has had both the responsibility and the authority to maintain law and order in his command. This authority derives generally from the President's constitutional power as Commander-in-Chief,[3] as well as from statutes,[4] and more particularly from regulations applicable to the respective military services.[5] Congress has implicitly recognized the existence of this authority in two criminal statutes. *See* 18 U.S.C. § 1382, which makes it unlawful to enter a military base for an unlawful purpose, or to reenter a base after having been removed therefrom; and 50 U.S.C. § 797, which makes unlawful the violation of any "regulation or order" issued by "any military commander designated by the Secretary of Defense" for "the protection or security of" property and places subject to his jurisdiction, including "the ingress thereto or egress or removal of persons therefrom. . . ."

The military's power to preserve order among civilians on its own reservations has been recognized and affirmed by the Supreme Court, *see, e.g., Cafeteria Workers Union* v. *McElroy,* 367 U.S. 886 (1961), and by your predecessors. The first explicit formulation of the power of military officers to maintain order among civilians on a military reservation is apparently that given by Attorney General Butler in 1837, 3 Op. Att'y Gen. 268. In the course of affirming the power of the commandant of West Point to exclude civilians from that enclave, the Attorney General said that the commandant "has a general authority to prevent any person within [the base] limits from interrupting its discipline, or obstructing in any way the performance of the duties assigned" to military personnel there stationed. *Id.* at 272. Even with respect to civilians owning property within a military enclave, "there can be no doubt of [the commandant's] authority to exclude such person . . . from access to any part of the post not essential to the use of the building he may occupy, and to his ingress and egress from it."

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[3] We believe it beyond question that, inherent in the President's power as Commander-in-Chief, is the authority to see that order and discipline are maintained in the armed forces. In the chain of command, base commanders perform this function on behalf of the President, on their respective bases.

[4] Congress has provided that the Secretaries of the Army and Air Force "[are] responsible for and [have] the authority necessary to conduct all affairs" of their respective Departments, 10 U.S.C. §§ 3012(b) and 8012(b). As part of this authority, the Secretaries have been given the power to issue regulations for "the custody, use, and preservation of [the Department's property]." 5 U.S.C. § 301. *See also* 10 U.S.C. §§ 4832 and 9832. The Supreme Court has held that Army regulations, when sanctioned by the President, have the force of law. *See United States* v. *Eliason,* 41 U.S. (16 Pet.) 291, 301–02 (1842).

[5] Regulations promulgated by the Secretary of the Army state that a base commander is "responsible for the efficient and economical operation, administration, service, and supply of all individuals, units, and activities assigned to or under the jurisdiction of the installation . . ." 32 C.F.R. § 552.18(c). In the Air Force, base commanders are "responsible for protecting personnel and property under their jurisdictions and for maintaining order on installations, to insure the uninterrupted and successful accomplishment of the Air Force Mission." 32 C.F.R. § 809a.1(a).

Attorney General Butler's views of the broad discretionary power of the base commander were reiterated by Attorney General Hoyt in 1906: "The power of a military commandant over a reservation is necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand." 26 Op. Att'y Gen. 91, 92.

Numerous statements of the Army Judge Advocate General's Office reconfirm the long-standing power of commanding officers to control civilian access to and behavior on military bases:

> It is well settled that a post commander can, under the authority conferred on him by statutes and regulations, in his discretion, exclude private persons and property therefrom, or admit them under such restrictions as he may prescribe in the interest of good order and military discipline.

JAG 680.44, October 6, 1925. *See also* JAGA 1956/8970, December 27, 1956.

The commander of a military base has broad responsibility for the maintenance of order on the base under his command, and a commensurate degree of authority follows that responsibility. In the recent case of *Relford* v. *Commandant,* 401 U.S. 355, 367 (1971), the Supreme Court stressed "[t]he essential and obvious interest of the military in the security of persons and of property on the military enclave." A military base need not be segregated, and, indeed, generally cannot rationally be segregated into military and non-military areas for law enforcement purposes. Thus, a base commander may exercise his authority to maintain order base-wide, even in areas utilized for putatively non-military purposes. In *Relford,* the Court emphasized:

> [t]he impact and adverse effect that a crime committed against a person or property on a military base, thus violating the base's very security, has upon morale, discipline, reputation and integrity of the base itself, upon its personnel and upon the military operation and the military mission.

401 U.S. at 367. *See also Greer* v. *Spock,* 424 U.S. 828, 838 (1976) in which the Court again noted "the historically unquestioned power" of a commanding officer to prevent civilian disruption of the functioning of a military base.

It is necessary to reconcile this broad and accepted authority of military base commanders with the Posse Comitatus Act, 18 U.S.C. § 1385. That statute, enacted during Reconstruction, provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

The Posse Comitatus Act was passed as a partisan reaction to the equally partisan use of troops for law enforcement purposes in the civilian community after the Civil War.[6] The Act was not intended, and has never been interpreted, to restrict military authorities' ability to maintain the security of a military installation.

In interpreting the applicability of the prohibition of the Posse Comitatus Act to the use of military personnel, the Department of Justice and the Department of Defense generally have been careful to distinguish between the use of such personnel on military bases, on the one hand, and off military bases on the other.[7] And at least one court has specifically held that the Posse Comitatus Act was not intended to prohibit military personnel from arresting civilians on military bases who, by committing crimes, are a threat to military or other federal property or to the good order and discipline of the base. In *United States* v. *Banks,* 539 F.2d 14 (9th Cir. 1976), *cert. denied,* 429 U.S. 1024 (1977), the United States Court of Appeals for the Ninth Circuit squarely rejected a civilian's claim that his arrest by military police on a military base for violation of federal narcotics law violated the Posse Comitatus Act. The court held that the Act "does not prohibit military personnel from acting upon on-base violations committed by civilians." 539 F.2d at 16.

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[6] The practice of using troops in a marshal's posse appears to have begun about 1854 during the bitter political struggle over the Fugitive Slave Act in the North, and was explicitly approved by Attorney General Cushing. *See* 6 Op. Att'y Gen. 466, 473 (1854). Following the Civil War, wide use was made of the military posse for law enforcement activities under the control of federal marshals, federal officers, and sheriffs. *See* 7 Cong. Rec. 3581 (1878) (remarks of Rep. Kimmel). During the congressional debates over the Act, a number of specific practices were cited as abuses: the use of troops by federal officials as guards during the 1876 presidential election, *id.* at 3850, 4185, and 4240 (1878) (remarks of Sens. Southard, Merrimon, and Kernan); the widespread use of troops to assist revenue officers in destroying illegal stills, *id.* at 4248 (remarks of Sen. Hill); and the use of troops, without presidential authorization, to assist in the suppression of a labor dispute, *id.* at 3581 (remarks of Rep. Kimmel). The deleterious effect of the practice on the command structure of the Army, and criticism of the general practice by military leaders, were also cited, *id.* at 3581 and 4241 (remarks of Rep. Kimmel and Sen. Sargent).

[7] For example, since 1942 an agreement has existed between the Departments of Defense and Justice permitting military lawyers to prosecute petty offenses committed on military reservations by civilian employees or visitors to the base. *See* paragraphs 6 and 7 of the Department of the Army Regulation 27-40. In 1962, after this arrangement had been in effect for over 20 years, both the Office of Legal Counsel of this Department and the Judge Advocate General of the Army reaffirmed that this practice does not violate the Posse Comitatus Act.

Applying this learning and experience to present circumstances, I conclude that the Posse Comitatus Act does not restrict the broad authority of military commanders in their use of military personnel to protect the "morale, discipline, reputation and integrity" of the base while the Cuban parolees are housed there. To this end, military personnel may take any steps deemed by the base commander to be reasonably necessary to ensure that the Cuban parolees do not breach the peace of the base, even where disturbances are confined to the area to which the parolees are restricted. Military personnel may apprehend and restrain parolees for on-base violations of federal and state law which in the base commander's view threaten the security and good order of the base.[8]

The military has primary authority for the care of the Cuban parolees while they are housed on the bases, and it can use military personnel to protect the delivery of that care against any disruption. Military personnel may use necessary force against civilian conduct threatening military equipment or facilities provided for the use of the parolees, and may patrol within the reserved area for this purpose.

Finally, a military commander may lawfully restrict the parolees' access to areas of the base not specifically designated for their use, and may use military personnel to enforce this restriction. Specifically, military personnel may be used to contain the parolees within the area to which they have been assigned. However, a claim by a parolee of a legal right to depart a base should be evaluated by non-military law enforcement personnel.

It should not go unremarked that all or most of these measures seem to be well within the authority given the base commander in the regulations of both the Army and the Air Force.[9]

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

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[8] If a Cuban parolee is arrested, he should be turned over as soon as practicable to civilian authorities. *See* 32 C.F.R. § 501.1(c).

[9] *See, e.g.*, 32 C.F.R. § 552.18(f) (Army commandant may establish rules governing entry into and exit from the installation, and the search of civilians when entering, during their stay, or when leaving); 32 C.F.R. § 851.13 (Air Force regulations on resource protection and visitor "control and surveillance" in controlled areas of the base). *See also* 32 C.F.R. § 503.1 (Army personnel have "the ordinary right and duty of citizens to assist in the maintenance of the peace," and may apprehend and restrain persons committing a felony or breach of the peace in their presence).

Constitutionality of Legislation Extending Federal Grants to Students at Nonpublic Schools

Views expressed in earlier opinion, that extension of Basic Educational Opportunity Grants to students enrolled in nonpublic elementary and secondary schools would violate Establishment Clause of the First Amendment, reconsidered and reaffirmed.

May 29, 1980

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

In a letter of April 25, 1980, the Secretary of Education requested your opinion on the constitutionality of S. 1101, a bill to extend Basic Educational Opportunity Grants (BEOG) [1] to students enrolled in private elementary and secondary schools. Attorney General Bell, in a letter of March 17, 1978, to the then Secretary of Health, Education, and Welfare, concurred in the conclusions expressed in the attached March 16, 1978, opinion of this Office on a similar bill. [2 Op. O.L.C. 77 (1978).] Attorney General Bell concluded that such extension of these grants to students enrolled in nonpublic elementary and secondary schools would be unconstitutional. We have reconsidered our earlier views and believe that subsequent Supreme Court decisions confirm our conclusions. This memorandum supplements the views expressed in our March 16, 1978, opinion.

The BEOG program, as it now operates, provides grants to certain needy students enrolled in institutions of higher education. S. 1101 would make students enrolled in private elementary and secondary schools eligible for these grants.

In order for a statute to survive Establishment Clause scrutiny, it must have a secular legislative purpose; it must not have a primary effect that either advances or inhibits religions; and it must not foster an excessive entanglement with religion. *Lemon* v. *Kurtzman,* 403 U.S. 602, 612 (1971). This test has been repeated in every significant Supreme Court decision in this area during the last decade. There is no evidence in cases decided by the Supreme Court since our earlier memorandum that this three-part test has been altered in any significant way.

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[1] 20 U.S.C. § 1070a (1976), *as amended by* 20 U.S.C. § 1070a (Supp. II 1978).

Applying that test to the BEOG bill now under consideration in the Senate, we remain of the view that while the program envisoned in that bill might be found to have a neutral, nonreligious purpose, it would be struck down, nonetheless, because it has a primary effect that advances the religious mission of sectarian elementary and secondary schools.

The programs appears to be virtually indistinguishable from that considered by the Congress two years ago and is not constitutionally distinguishable from those tuition grant programs struck down in *Committee for Public Education* v. *Nyquist,* 413 U.S. 756 (1973), and a companion case, *Sloan* v. *Lemon,* 413 U.S. 825 (1973).

In *Nyquist,* the Court found that the New York program of tuition reimbursement to parents of children attending nonpublic elementary or secondary schools and a tax deduction provision had a primary effect of advancing religion. Likewise, a similar Pennsylvania tuition reimbursement program was invalidated in *Sloan*. The Court made clear in these cases that it would strike down unrestricted grants to sectarian elementary and secondary schools, even if given indirectly by payments to the parents rather than the schools, *see Sloan* v. *Lemon,* 413 U.S. at 832, because such funds could be used to promote the religious mission of the schools. The Court in *Nyquist* noted that whether the funds are provided as reimbursement for tuition paid in past years or as grants for the current year is of no constitutional significance. 413 U.S. at 786–87. Nor does it matter whether the payment is made to the students rather than to the parents because "the Court look[s] beyond the formal recipient of the aid" to its primary effect of supporting the sectarian schools. *See National Coalition for Public Ed.* v. *Harris,* 489 F. Supp. 1248, 1259 (S.D.N.Y. 1980), *citing Sloan* v. *Lemon,* 413 U.S. at 832.

Recent Supreme Court decisions do not question *Nyquist* and *Sloan*. Just last term, the Court summarily affirmed *Beggans* v. *Public Funds for Public Schools,* 442 U.S. 907 (1979). The Third Circuit in *Beggans* relied heavily on *Nyquist* to strike down a New Jersey program of tax exemptions for parents of children enrolled in nonpublic elementary and secondary schools. 590 F.2d 514 (3d Cir. 1979). The court found that:

> Even if parents of dependents in nonpublic schools do have greater expenses than those supporting dependents in public schools, the State may not "equalize" the burden by granting a benefit only to taxpayers with dependents in private or parochial schools. *Nyquist* explicitly forecloses the argument that the State may deny an exemption to the parents of students in public schools but may grant an exemption to parents of students in nonpublic schools, on the supposition that this differing treatment may tend to equalize the two classes of parents in their educational expenditures.

> Inasmuch as New Jersey's exemption denies to parents of public school students a benefit granted to parents of students in nonpublic schools, the exemption is not saved because a similar provision applies to parents of college and university students, including those in public institutions.

Id. at 519–20 (citations deleted). *Beggans* noted that *Nyquist* held that the tax exemption and tuition reimbursement programs each independently violated the Constitution. *Id.* at 520. As in the New Jersey program before the court in *Beggans,* the fact that the BEOG program is available to students in institutions of higher education does not make it a comprehensive and neutral scheme more similar to the property tax exemption for real property owned by religious organizations and used for religious purposes upheld in *Walz* v. *Tax Commission,* 397 U.S. 664 (1970).

This term the Supreme Court upheld a New York statute that directs the reimbursement of nonpublic schools for the costs incurred in administering state-mandated testing and certain other administrative activities. *Commission for Public Education and Religious Liberty* v. *Regan,* 444 U.S. 646 (1980). The Court concluded that although sectarian schools received this aid along with secular private schools, the statute does not have a primary effect that advances religion. The funds go to clearly identifiable secular services. The Court compared the testing program in *Regan* with that upheld in *Wolman* v. *Walter,* 433 U.S. 229, 240–41 (1977), and found that since the school has no control over the content of the tests, they could not be used for religious educational purposes. The Court noted:

> if the grading procedures could be used to further the religious mission of the school, serious Establishment Clause problems would be posed under the Court's cases, for by furnishing the tests it might be concluded that the State was directly aiding religious education.

444 U.S. at 657. The administrative costs for which schools were reimbursed were also found to be separable and not related to the teaching function.

Regan does not purport to call into question the direct precedent in *Nyquist* and *Sloan* that tuition reimbursement programs are unconstitutional. Tuition finances all aspects of a nonpublic school's program, including the teaching and general religious education function of sectarian schools. Reimbursement thus would have a primary effect of advancing the religious mission of the schools.[2] Tuition reimbursement

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[2] The Supreme Court has developed a presumption that aid to the teaching aspects of sectarian elementary and secondary schools has a primary effect of advancing the religious mission of the

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cannot be equated with the clearly segregated secular activities upheld in *Regan.*[3]

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schools because their educational function is pervasively sectarian; *viz.*, there is no clearly segregated secular educational function. *See, e.g., Meek* v. *Pittenger,* 421 U.S. 349, 365–66 (1975); *Lemon* v. *Kurtzman,* 403 U.S. 602, 617–19 (1971). The Court has not applied a similar presumption to institutions of higher education, *see, e.g., Tilton* v. *Richardson,* 403 U.S. 672 (1971), and therefore statutory schemes such as the BEOG program are defensible at the college and university level.

A three-judge district court has recently upheld a program of remedial and counseling services in the New York City sectarian elementary and secondary schools. *National Coalition for Public Ed.* v. *Harris,* 489 F. Supp. 1248 (S.D.N.Y. 1980) ("*PEARL*"). After taking extensive evidence on the operation of the fourteen-year program and the nature of the schools services, the court found that the New York City schools were not pervasively sectarian. *Id.* at 1260–65. The court then analyzed the regulations and history of the program and found that it did not have a primary effect of advancing the religious mission of the schools. We cannot predict, of course, whether the Supreme Court will adopt this approach. It cannot be applied to an analysis of S. 1101 on its face because there is no restriction in the bill that to be eligible students must attend schools that are not pervasively sectarian. Furthermore, the *PEARL* decision must be distinguished from analysis of the BEOG program because here we do not have a record of operation over many years to assure a court that "the result feared in other cases has not materialized." *Id.* at 1265. Most importantly, a decision on a discrete, carefully regulated public-school-within-a-sectarian-school Title I program does not have precedential value for a tuition reimbursement program that funds any aspect of the sectarian training. *PEARL* distinguished Title I from the statutes before the Court in *Nyquist* and *Sloan*:

> The program is therefore not comparable to a tuition reimbursement or tax break offered only to parents of private school students because it does not relieve the schools' financial burdens or supply funds free from use limitations and is not limited to a small class of beneficiaries.

Id. at 1260.

[3] The Supreme Court has found it unnecessary to analyze the third prong of the Establishment Clause test—the potential for administrative entanglement—in a case where it held that a tuition reimbursement program has a primary effect of aiding religious elementary and secondary schools. *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 794 (1973).

Procedural Provisions for Imposing the Death Penalty in Pending Legislation

[The following memorandum comments on proposed legislation to bring the federal death penalty provisions into compliance with the constitutional standards identified by the Supreme Court in *Furman* v. *Georgia,* 408 U.S. 238 (1972) and subsequent decisions. It identifies certain procedural provisions as likely to be subject to constitutional challenge, and indicates how the issues involved are likely to be resolved under existing case law. Among the issues discussed are: (1) whether the Constitution's requirement of a unanimous jury extends to the sentencing phase of a capital case; (2) whether the jury's consideration of mitigating factors may be limited; (3) whether evidence of aggravating factors may be admitted regardless of its admissibility under the rules of evidence; (4) whether the language specifying aggravating and mitigating factors is unconstitutionally vague; (5) whether the death penalty may be imposed for nonhomicidal crimes; and (6) whether appellate review only at the request of the defendant is an adequate safeguard against the random or arbitrary imposition of the death penalty.]

May 30, 1980

MEMORANDUM FOR THE ATTORNEY GENERAL

At the request of the Deputy Attorney General, this Office has prepared the following analysis of the constitutional issues raised by S. 114, a bill to establish procedures for the imposition of the sentence of death for certain federal crimes.* The death penalty is presently an authorized sentence upon conviction of at least ten federal offenses, including murder, treason, espionage, rape, air piracy and several other felonies if death results from the crime.[1] Since the Supreme Court's decision in *Furman* v. *Georgia,* 408 U.S. 238 (1972), the constitutionality of these sections has been in doubt because they lack guidelines for the exercise of sentencing discretion.

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*NOTE: The text of S. 114 as introduced in the Senate in 1979 appears at 125 Cong. Rec. 782–83 (January 23, 1979). Ed.

[1] *See* 18 U.S.C. § 34 (destruction of motor vehicles or motor vehicle facilities where death results); 18 U.S.C. § 351 (assassination or kidnapping of a Member of Congress); 18 U.S.C. § 794 (gathering or delivering defense information to aid a foreign government); 18 U.S.C. § 1111 (murder in the first degree within the special maritime and territorial jurisdiction of the United States); 18 U.S.C. § 1716 (causing death of another by mailing injurious articles); 18 U.S.C. § 1751 (murder or kidnapping of a President or Vice President); 18 U.S.C. § 2031 (rape within the special maritime or territorial jurisdiction of the United States); 18 U.S.C. § 2381 (treason); 49 U.S.C. § 1472(i) (aircraft piracy). S. 114 would make some changes in these provisions, including deletion of the death penalty for rape not resulting in death (*see Coker* v. *Georgia,* 433 U.S. 584 (1977)) and kidnapping in the course of a bank robbery not resulting in death. The bill would add a provision authorizing the death penalty for murder of a foreign official.

Prior to considering the issues raised by S. 114, it may be helpful briefly to review the recent Supreme Court decisions on capital punishment. In *Furman,* a five-Justice majority ruled in a per curiam opinion that the imposition of the death penalty in the cases before the Court would constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[2] Two of those Justices were of the opinion that capital punishment is *per se* unconstitutional.[3] The remaining three Justices did not reach the question whether the death penalty is unconstitutional in all circumstances. Justice Douglas concluded that the discretionary statutes in question were "pregnant with discrimination" in their operation and thus violated the Equal Protection Clause of the Fourteenth Amendment.[4] Justice Stewart objected to the penalty being applied in "so wantonly and so freakishly" a manner.[5] Justice White concluded that as the statutes were administered, they violated the Eighth Amendment because the penalty was "so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice." [6]

In *Gregg* v. *Georgia,* 428 U.S. 153 (1976), the Court reviewed the Georgia statute enacted in response to *Furman* and found it sufficient to overcome Eighth Amendment objections. *Id.* at 207.[7] Justices Stewart, Powell, and Stevens found four features of the statute to be particularly important: (1) the sentencer's attention was drawn to the particularized circumstances of the crime and of the defendant by reference to aggravating and mitigating factors; (2) the discretion of the sentencer was controlled by clear and objective standards; (3) the sentencer was provided with all the relevant evidence during a separate sentencing hearing, while prejudice to the defendant was avoided by restricting information on aggravating circumstances to that comporting with the rules of evidence; and (4) there was a system of appellate review of the sentence to guard against arbitrariness, excessiveness, and disproportionality. These conclusions were summarized as follows:

> [T]he concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of

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[2] 408 U.S. at 239–40.

[3] *Id.* at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

[4] *Id.* at 256–57.

[5] *Id.* at 310.

[6] *Id.* at 312–13.

[7] In companion cases, *Woodson* v. *North Carolina,* 428 U.S. 280 (1976), and *Roberts* v. *Louisiana,* 428 U.S. 325 (1976), a plurality ruled that imposition of mandatory death sentences violated the prohibition against cruel and unusual punishment under the Eighth and Fourteenth Amendments.

> the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Id. at 195. In a separate opinion, Justices White, Burger, and Rehnquist concurred in the judgment. *Id.* at 211–27.

In *Lockett* v. *Ohio,* 438 U.S. 586 (1978) and the companion case, *Bell* v. *Ohio,* 438 U.S. 637 (1978), the Court again considered the constitutionality of a State statute enacted in response to *Furman.* The Ohio statute at issue also set forth the aggravating and mitigating factors to be considered in the imposition of the death penalty. If the case went to trial, however, only three mitigating factors could be considered. Without a finding of one of these factors, and with a finding of an aggravating factor, imposition of the death penalty was mandatory. While the Court by a vote of seven to one found the imposition of the death penalty in this case to be unconstitutional, again there was no majority opinion.

Chief Justice Burger and Justices Stewart, Powell, and Stevens based their decision on the conclusion that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." [8] Justice Marshall adhered to his view that the death penalty is unconstitutional *per se.* Justice Blackmun found that the application of the penalty to an aider and abettor without regard to a specific *mens rea* in relation to the killing to be cruel and unusual. He also found that the statute violated the rule set down in *United States* v. *Jackson,* 390 U.S. 570 (1968), in that it permitted a judge who accepted a guilty plea to avoid imposing the death penalty in the interest of justice, but authorized consideration of only three mitigating factors if a defendant went to trial. Finally, Justice White objected to the Ohio statute because it included an aider and abettor within the scope of the death penalty without a finding that the defendant "engaged in conduct with the conscious purpose of producing death." [9]

The Court also has held that in addition to requiring certain procedural safeguards for imposition of the death penalty, the Eighth Amendment bars use of the death penalty if it is excessive in relation to the crime committed. *Coker* v. *Georgia,* 433 U.S. 584 (1977). In *Coker,* the Court concluded that the death sentence for rape of an adult woman when death did not result was disproportionate to the crime. *Id.* at 592.

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[8] *Lockett* v. *Ohio,* 438 U.S. at 604.

[9] *Id.* at 627–28.

Recently, the Court again reviewed a death sentence imposed under the Georgia statute. In *Godfrey* v. *Georgia,* 446 U.S. 420 (1980), the Court considered whether the Georgia Supreme Court had adopted such a broad and vague construction of one of the statutory aggravating circumstances as to violate the Eighth and Fourteenth Amendments. The aggravating circumstance in question provided that a person could be sentenced to death if the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Ga. Code Ann. § 27-2534.1(b)(7) (Supp. 1975). The Court previously had held in *Gregg* v. *Georgia,* 428 U.S. 153 (1976), that this statutory aggravating circumstance is not unconstitutional on its face. In the plurality opinion in *Godfrey,* written by Justice Stewart, joined by Justices Blackmun, Powell, and Stevens, the Court ruled that in upholding Godfrey's sentence, the Georgia Supreme Court did not satisfy the § (b)(7) criteria the Georgia high court itself had laid out in its prior cases. In light of the facts and circumstances of Godfrey's offense, the Court concluded that the Georgia Supreme Court did not apply a constitutional construction of § (b)(7). Justice Stewart stated: "There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 446 U.S. at 433. In a concurring opinion, Justice Marshall, joined by Justice Brennan, adhered to his view that the death penalty is unconstitutional in all cases, and, in addition, agreed with the plurality that the Georgia Supreme Court's construction of § (b)(7) in this case was unconstitutionally vague. He suggested that the sentencing procedures of the type approved in *Gregg* are doomed to failure because the criminal justice system is incapable of guaranteeing objectivity and evenhandedness. Chief Justice Burger and Justices Rehnquist and White dissented, warning that the Court should not put itself in the role of second-guessing state judges and juries.

S. 114 seeks to establish constitutional procedures for the imposition of the death sentence upon conviction of federal crimes for which the death penalty is authorized. The bill would amend Title 18 of the United States Code, rather than the Federal Rules of Criminal Procedure, as some previous bills have proposed.[10] It provides that after conviction of a capital offense the defendant shall be subject to the death penalty only if a hearing is held in accordance with specified procedures. The hearing would be conducted before the jury which determined the defendant's guilt, unless, under specified circumstances, a new jury must be impaneled or the parties agree that the court alone conduct the hearing. At this sentencing hearing, information would be presented as to any matter relevant to the sentence, including matters relevant to specified aggravating and mitigating factors. The jury, or if there is no jury, the court, is required to return special findings identifying any aggravating and mitigating factors found to exist. The burden of establishing the existence of any aggravating factors is on the government, and is not satisfied unless established beyond a reasonable doubt. The burden of establishing the existence of any mitigating factor is on the defendant, and is not satisfied unless established by a preponderance of the information.

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[10] S. 114 is not coordinated with S. 1722, the bill to revise Title 18 of the United States Code. In its present form, S. 1722 does not authorize the penalty of death for any crime. *See* S. 1722, Part III—Sentences.

If none of the specified aggravating factors are found to exist, the court must impose an authorized sentence other than death. If one or more of the aggravating factors are found to exist, then it must be determined whether the aggravating factors outweigh the mitigating factors, or, in the absence of mitigating factors, whether the aggravating factors are sufficient in themselves to justify a sentence of death. Upon a jury finding that a sentence of death is justified, the court is required to sentence the defendant to death. The sentence of death is subject to review by the court of appeals.

There have been previous attempts to bring the federal death penalty provisions into compliance with the constitutional standards identified by the Court in *Furman, Gregg,* and *Lockett.* S. 114 is very similar to S. 1382, which was introduced in the 95th Congress by the late Senator McClellan for himself and others. Prior to introducing S. 1382, Senator McClellan requested the Department of Justice to review the draft bill and comment with respect to its constitutionality in light of the recent Supreme Court decisions. Former Attorney General Bell responded to Senator McClellan by letter dated March 25, 1977. The letter stated that "the procedures set forth in the draft bill are consistent with the decision in the *Furman* case, and are also consistent with the opinions of the Supreme Court in *Gregg* v. *Georgia* . . . and *Proffitt* v. *Florida*. . . ."[11] Attorney General Bell's letter concluded: "We believe that the proposed bill would be found by the Supreme Court to meet constitutional requisites" and "I support your efforts to bring it to the attention of the Senate."

The following year, hearings were held on S. 1382 and H.R. 13360, a House bill to amend the Federal Rules of Criminal Procedure to provide for sentencing procedures in capital cases. A representative of this Department testified on both bills, generally concluding that, although the Court is unusually divided on these issues and any analysis thus is necessarily speculative, the bills probably satisfied the standards of the case law.[12]

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[11] In *Proffitt* v. *Florida,* 428 U.S. 242 (1976), a case decided with *Gregg* and *Jurek* v. *Texas,* 428 U.S. 262 (1976), a plurality upheld a Florida statute which directed the trial judge to weigh eight aggravating factors against seven mitigating factors to determine whether to impose the death penalty.

[12] In 1977, Mary Lawton, Deputy Assistant Attorney General, Office of Legal Counsel, testified on S. 1387 before the Senate Subcommittee on Criminal Laws and Procedures of the Senate Judiciary

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S. 114 was introduced by Senator DeConcini for himself and Senator Thurmond on January 23, 1979. It was referred to the Committee on the Judiciary which, on January 17, 1980, reported favorably thereon with minor technical amendments. S. Rep. No. 554, 96th Cong., 2d Sess. 1 (1980). No hearings were held by the Committee. In the Senate report, Senators Kennedy, Culver, and Leahy set forth their individual views opposing S. 114 and urging that "capital punishment is wrong in principle, wrong as a matter of policy, and wrong as drafted in S. 114." *Id.* at 33. Senator Baucus also presents his individual views. He states that the bill "is flawed by its precipitous method of passage by the Senate Judiciary Committee, its overly broad application to non-homicidal Federal crimes, and serious constitutional inadequacies," and recommends that the Senate recommit S. 114 to the Judiciary Committee. *Id.* at 34–5.[13] On March 7, 1980, 22 Senators, including Senators on both sides of the death penalty issue, signed a "Dear Colleague" letter, stating that they will move to recommit S. 114 or any similar bill to the Judiciary Committee so that it may be presented to the Senate "only after full hearings and debate." It is against this background that we analyze the constitutional issues raised by S. 114.

I. Discussion

Because of the controversy surrounding the death penalty, and the several recent Supreme Court decisions which failed to command a clear majority, any death penalty legislation is bound to raise difficult constitutional questions. Some of the questions identified below were raised by prior legislation and have been the subject of extensive testimony before congressional committees. Other issues discussed here are raised by provisions in S. 114 which did not appear in the prior legislation. As with the prior bills, it is not possible to state definitively how the Court would resolve each of the issues raised by S. 114. We have attempted to identify provisions likely to be challenged as constitutionally inadequate and to indicate where possible how we think these issues would be resolved under the case law to date.

1. Determination by Majority Vote of Aggravating and Mitigating Factors

Both S. 1382 and H.R. 13360 required unanimity in all jury findings. S. 114, however, provides that the jury's findings of aggravating or

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Committee. She again testified on S. 1382 on April 27, 1978, before the Senate Judiciary Committee itself. On July 17, 1978, after the *Lockett* decision, she testified on H.R. 13360 before the Subcommittee on Criminal Justice of the House Judiciary Committee. There have been no hearings in the Senate on death penalty legislation since the *Lockett* decision was issued.

[13] Senator Baucus notes that although the issue of capital punishment has been considered by the Senate Judiciary Committee in the past, S. 114 was not discussed or evaluated by the Committee in the 96th Congress. He notes that new members of the Senate have not had an opportunity to consider the bill in hearings and none of the members of the Committee have considered the changes in the bill made prior to introduction this session. S. Rep. No. 554, 96th Cong., 2d Sess. 34 (1980).

mitigating factors "shall be made by majority vote." If one or more aggravating factors are found to exist, the jury must then consider whether the aggravating factor(s) sufficiently outweigh any mitigating factors, or, in the absence of mitigating factors, whether the aggravating factor(s) is itself sufficient to justify a sentence of death. Based upon these considerations, the jury must return a finding by unanimous vote as to whether a sentence of death is justified.

A criminal defendant's right to trial by jury is guaranteed both in Article III, § 2, clause 3, and in the Sixth Amendment. Rule 31(a) of the Federal Rules of Criminal Procedure requires that the verdict be unanimous. The Supreme Court has determined that this unanimity requirement in federal criminal cases is constitutionally based. *See Johnson* v. *Louisiana*, 406 U.S. 356 (1972); *Apodaca* v. *Oregon*, 406 U.S. 404 (1972). *See also United States* v. *Scalzitti*, 578 F.2d 507, 512–13 (3d Cir. 1978); *United States* v. *Gipson*, 553 F.2d, 453, 456 (5th Cir. 1977). The question raised here is whether this requirement of a unanimous verdict extends to the sentencing phase of a capital case.[14] This question has never been directly addressed by the Court.

In *Andres* v. *United States*, 333 U.S. 740 (1948), the Court suggested that unanimity is required in all federal jury verdicts. In *Andres*, the petitioner had been sentenced to death upon conviction of first degree murder. The determinative statute provided that where the accused is convicted of murder in the first degree the jury may qualify its verdict by adding the words "without capital punishment," in which event the punishment must be imprisonment. The government contended that the statute required that the jury first unanimously decide guilt or innocence, and, having done so, then consider whether to recommend mercy, but that if they failed to reach a unanimous agreement to recommend mercy, the guilty verdict without a recommendation should stand as the verdict of the jury. The petitioner contended that the proper construction should be that unanimity is required both as to guilt and punishment, and therefore, if the jury were not unanimous as to the death penalty, he should not be condemned. The Court concluded that the statute required that the jury's decision on both guilt and whether the punishment of death should be imposed must be unanimous. As to the constitutionality of non-unanimous verdicts, the Court wrote:

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[14] A related question that could be raised relates to S. 114's provision that a jury impaneled for the sentencing hearing "shall consist of twelve members, but, at any time before the conclusion of the hearing, the parties may stipulate with the approval of the court that it shall consist of any number less than twelve." The same provision was included in S. 1382, and a similar provision appeared in H.R. 13360. In testimony on these bills in 1978, this Department noted that, while stipulation of the parties is normally adequate to avoid a claim of denial of Sixth Amendment rights, the Court may consider this provision impermissible in cases in which a death sentence may be imposed. Without stating that the provision is constitutionally inadequate, it was suggested that, given the Court's close scrutiny of procedures used to impose the death penalty, the committee might wish to consider whether a smaller jury is warranted. *See generally Ballew* v. *Georgia*, 435 U.S. 223, 232–39 (1978); *Williams* v. *Florida*, 399 U.S. 78, 103 (1970).

> Unanimity in jury verdicts is required where the Sixth and Seventh Amendments apply. In criminal cases this requirement of unanimity extends to all issues—character or degree of the crime, guilt and punishment—which are left to the jury. A verdict embodies in a single finding the conclusions by the jury upon all the questions submitted to it.

Id. at 748. The Court noted that its construction of the statute was more consonant with the history of the Anglo-American jury system than the construction urged by the government.

This issue has not been discussed in the recent cases upholding death penalty statutes. In *Gregg* v. *Georgia*, jury unanimity was required as to a finding of an aggravating circumstance. 428 U.S. 153, 207–08. In *Proffitt* v. *Florida*, 428 U.S. 242 (1976), the statute provided that the jury's verdicts could be determined by majority vote, but the verdict is advisory only; the actual sentence is determined by the trial judge. *Id.* at 248–49. In *Jurek* v. *Texas*, 428 U.S. 262 (1976), the Court noted that the Texas law is unclear as to the procedure to be followed in the event that the jury is unable to answer the questions regarding aggravating circumstances, but does require that the jury findings as to aggravating circumstances be unanimous. *Id.* at 269 n.5.

The Court has often repeated that the penalty of death is qualitatively different from any other sentence and calls for a greater degree of reliability in sentencing. Even if a majority vote would be permissible for determination of sentences less than death, it may not be permissible for capital punishment decisions. Concerns expressed by the Court in *Ballew* v. *Georgia*, 435 U.S. 223, 232–36 (1978), regarding comparative unreliability of verdicts reached by smaller juries, also arise when one contrasts majority votes with unanimous votes.

The procedure established by S. 114 also runs the risk of being labeled arbitrary. The Court has emphasized that it is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion. *Gardner* v. *Florida*, 430 U.S. 349, 358 (1977). Under S. 114, it is possible that only seven jurors would find that there is a reason to impose the death sentence but that all twelve would nevertheless approve the death penalty. This raises serious questions as to the actuality, as well as the appearance, of arbitrary decisionmaking rather than decisionmaking based on reason.[15]

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[15] Even if unanimity is not generally required in jury sentencing verdicts, it could be argued that for sentencing in capital cases, at least some of the aggravating factors rise to the level of elements of the crime and thus must be found to exist by unanimous vote. In *Jurek* v. *Texas*, 428 U.S. 262 (1976), the Court approved the statute in question although it did not list aggravating circumstances to be considered, because Texas had limited the categories of murders for which a death sentence could be imposed and thus accomplished the same result. *Jurek* could be read to suggest that the findings as to

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2. Limiting Consideration of Mitigating Factors

S. 114 provides that at the sentence hearing, information may be presented as to any matter relevant to the sentence. It further provides that in addition to the trial transcript and exhibits, any other information relevant to any mitigating or aggravating factor, including those set forth in the bill, may be presented by either the government or the defendant. In the subsection concerning the return of findings, however, the bill provides: "It shall return special findings identifying any aggravating and mitigating factors, *set forth in subsections (f), (g), and (h), found to exist.*" (Emphasis added.) It is directed to weigh against any aggravating factors "any mitigating factors *found to exist.* . . ." (Emphasis added.) There is, therefore, considerable ambiguity with respect to whether the drafters of S. 114 intended to circumscribe the jury's consideration of mitigating factors. The summary Senate Committee Report is unilluminating on this point.

In *Lockett* v. *Ohio,* 438 U.S. 586, 604 (1978), the Court held that the sentencer cannot be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Chief Justice Burger, writing for the Court, noted that the nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional 0requirement in imposing the death sentence. In *Lockett,* the statute at issue provided that if a verdict of aggravated murder with specifications was returned, the trial judge must impose a death sentence unless, after "considering the nature and circumstances of the offense" and the defendant's "history, character, and condition," he found by a preponderance of the evidence that one of three mitigating factors were present. The Court rejected the contention that the language allowing the judge to consider other factors in determining whether any of the mitigating circumstances existed corrected the statute's deficiency because, although these other factors could be considered, one of the enumerated factors had to be found to avoid imposition of the death penalty. Similarly, although S. 114 allows the sentencer to consider all information received during the hearing, it appears that its findings may include only those mitigating factors listed in subsection (f), and it is only these mitigating factors that can be weighed against the aggravating factors found to exist. If the intent of the bill is to limit the mitigating factors which may be considered, it seems to violate the rule set forth in *Lockett.* If this is not the intent of the bill, this ambiguity should be clarified.

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aggravating circumstances may be compared for some purposes to the findings of the elements of the crime. *Compare Mullaney* v. *Wilbur,* 421 U.S. 684, 697–98 (1975) *with Patterson* v. *New York,* 432 U.S. 197 (1977).

3. Allowing Admission of all Relevant Evidence Regardless of Its Admissibility Under the Rules of Evidence

S. 114 provides that either the Government or the defendant may present any information relevant to the sentence "regardless of its admissibility under the rules governing admission of evidence at criminal trials." This modifies the section of S. 1382 which provided that any information relevant to any mitigating factor may be presented regardless of its admissibility under the rules governing admission of evidence at criminal trials, but that the admissibility of information relevant to any aggravating factor must be governed by such rules. H.R. 13360 also provided that the rules of evidence would govern admission of evidence regarding aggravating circumstances.

In *Gardner* v. *Florida,* 430 U.S. 349 (1977), the Court ruled that the petitioner was denied due process when a judge, overruling the jury's recommendation of a life sentence, imposed a death sentence based on information contained in a confidential presentence report. Justice Stevens, writing for a plurality, emphasized that the opportunity to challenge the accuracy or materiality of sentencing information is essential. *Id.* at 356. Although the practice in *Gardner* is distinguishable from the practice here questioned, the case raises questions as to the validity of eliminating the evidentiary requirements.

The Georgia statute approved in *Gregg* provides that the sentencing hearing is subject to the laws of evidence and that the jury or judge shall hear "evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of *nolo contendere* of the defendant, or the absence of any such prior criminal convictions and pleas. . . ." *See* 428 U.S. at 209 n.2. In discussing the requirement that a jury be given guidance in its decisionmaking, Justice Stewart noted that the provision of relevant information under "fair procedural rules" is one of the ways to guarantee that the information provided at the sentencing hearing will be properly used. *Id.* at 192. In rejecting petitioner's objection to the wide scope of evidence and argument allowed at presentence hearings, the Court wrote:

> We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. (Citation omitted.) So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

Id. at 203–04.

The current federal rules place no restriction on the type of information a court may consider in arriving at a sentencing determination. Section 3577 of Title 18 provides: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." It is clear under *Lockett* that the sentencer may not be precluded from consideration of any mitigating factor. It is also clear, however, that fair procedural rules and a resulting greater degree of reliability are required in capital cases. This suggests that requiring adherence to the rules of evidence, at least for purposes of receiving information regarding aggravating circumstances, may be advisable. The Court's discussion in *Gregg* makes it clear that open and far-ranging argument is possible even when the rules of evidence are observed. The Judiciary Committee report on the bill does not state why this change was made. S. Rep. No. 554, 96th Cong., 2d Sess. 15 (1980). It merely notes that both parties are permitted to present arguments as to the adequacy of the information.

4. Vagueness of Language Specifying Aggravating and Mitigating Factors

S. 114 specifies that one of the aggravating factors the sentencer shall consider is whether "the defendant committed the offense in an especially heinous, cruel, or depraved manner." The issue raised by this language is whether it is so broad and vague as to give no guidance to the jury, yielding an arbitrary result and thus violating the Eighth Amendment. A similar challenge was made to certain statutory language in *Gregg*. Petitioner in *Gregg* challenged the language of three aggravating factors in the Georgia statute: (1) the section that authorizes the jury to consider whether a defendant has a "substantial history of serious assaultive criminal convictions" (Ga. Code Ann. § 27-2534.1(b)(1) (Supp. 1975)); (2) the section that speaks of creating a "great risk of death to more than one person" (Ga. Code Ann. § 27-2534.1(b)(3) (Supp. 1975)); and (3) the section authorizing the jury to consider whether the "offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of the mind, or an aggravated battery to the victim" (Ga. Code Ann. § 27-2534.1(b)(7) (Supp. 1975)). As to the first section, Justice Stewart noted that the Supreme Court of Georgia held this provision impermissibly vague in *Arnold* v. *State*, 236 Ga. 534, 540, 224 S.E.2d 386, 391 (1976), because it did not provide the jury with sufficiently clear and objective standards. As to the second section, the Court conceded that the language of subsection (b)(3) might be susceptible to an overly broad interpretation, but stated that the Supreme Court of Georgia had not so construed it. The third section challenged, subsection (b)(7), most closely parallels the language in question in S. 114, which is arguably even more vague than § (b)(7). The petitioner challenged § (b)(7) as both overbroad and impermissibly vague. Again relying on narrow constructions of the language by the Georgia courts, these challenges were rejected. 428 U.S. at 201, 202 n.54.

The language defining the aggravating circumstances in the Florida statute approved in *Proffitt* v. *Florida,* 428 U.S. 242, 255–57 (1976), also was asserted to be so vague and so broad that virtually any person convicted of a capital crime would be eligible for the death penalty. In particular, the petitioner attacked the language authorizing the death penalty if the crime is "especially heinous, atrocious, or cruel" or if "[t]he defendant knowingly created great risk of death to many persons." Fla. Stat. Ann. § 921.141(5)(c)(h) (Supp. 1976–1977). The Court again looked to interpretations by the state courts and decided that it could not conclude that the language "as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." *Id.* at 255–56.

The Court has put all lower courts on notice, however, that it carefully will scrutinize application of these ambiguous provisions. In *Godfrey* v. *Georgia, supra,* the Court adhered to its ruling in *Gregg* that § (b)(7) was not unconstitutional on its face. The plurality's reading of the Georgia court's interpretations of § (b)(7) led them to the conclusion, however, that the § (b)(7) circumstance cannot be found to exist absent serious physical abuse of the victim before death. Because no claim was made that Godfrey physically abused his victims before murdering them, the Court ruled that § (b)(7), as interpreted by the Georgia Supreme Court, had not been properly applied by that court in this case. Their decision was overturned because they did not constitutionally apply § (b)(7) to the facts and circumstances of the offense and the state of mind of the defendant.

The language of S. 114, referring to commission of the offense "in an especially heinous, cruel, or depraved manner," is even broader than § (b)(7) of the Georgia statute. It does not qualify these general terms by requiring a finding of "torture, depravity of mind, or an aggravated battery to the victim" as does the Georgia statute. Because any murder could be described as "heinous, cruel or depraved," the provision, without additional qualifications, probably does not meet the constitutional requirements repeated in *Godfrey,* that the sentencer's discretion be channeled by "clear and objective standards," that provide "specific and detailed guidance," and that "make rationally reviewable the process for imposing a sentence of death." 446 U.S. at 428 (footnotes omitted).[16]

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[16] One of the statutory mitigating factors also may be too vague. S. 114 requires that the jury consider whether the defendant was "youthful at the time of the crime." This vague phrase could

Continued

5. Imposition of the Death Penalty for Non-Homicidal Crimes

S. 114 itself does not specify the sentences that may be imposed for capital crimes. It does, however, amend some of the substantive sections that do specify the elements of the crimes and the authorized sentences. Most of the crimes included must result in the death of the victim before the death penalty is authorized. There are two exceptions, however, for espionage (18 U.S.C. § 794(a)) and treason (18 U.S.C. § 2381). The Court's ruling in *Coker*, that the death penalty is unconstitutionally excessive in relation to the crime of rape of an adult woman, raises the question whether the death penalty is excessive in relation to any crime in which death does not result.[17]

In *Coker*, Justice White, speaking for the plurality, characterized the test first enunciated in *Gregg* as (1) whether the sentence makes a measurable contribution to acceptable goals of punishment, and (2) whether the sentence is grossly out of proportion to the crime. 433 U.S. at 592. The plurality examined the practice in other countries and the position taken by those states which had reinstated the death penalty after *Furman* and concluded that the modern approach was not to impose the death penalty for rape. It then brought its own judgment to bear on the question of the acceptability of the death penalty under the Eighth Amendment. It reasoned:

> Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and irrevocability," *Gregg* v.

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easily be amended to specify below what age a defendant should be considered "youthful." The International Covenant on Civil and Political Rights, signed on December 19, 1966, and entered into force on March 3, 1976, provides in Article 6, § 5, that the death sentence shall not be imposed for crimes committed by persons below 18 years of age. This Covenant was transmitted by the President to the Congress on February 23, 1978. The Congress has held hearings on the Covenant but has not yet acted. *Four Treaties Pertaining to Human Rights: Message from the President of the United States*, S. Exec. Doc. C, D, E, F, 95th Cong., 2d Sess. 25 (1978); *International Human Rights Treaties: Hearings on Exec. Doc. C, D, E, and F. 95–2, Four Treaties Relating to Human Rights Before the Senate Committee on Foreign Relations*, 96th Cong., 1st Sess. (1979).

[17] In his dissent in *Coker*, Chief Justice Burger wrote: "The clear implication of today's holding appears to be that the death penalty may be properly imposed only as to crimes resulting in death of the victim. This casts serious doubt upon the constitutional validity of statutes imposing the death penalty for a variety of conduct which, though dangerous, may not necessarily result in any immediate death, *e.g.*, treason, airplane hijacking, and kidnapping." 433 U.S. at 621.

> *Georgia*, 428 U.S. at 187, is an excessive penalty for the rapist who, as such, does not take human life.

433 U.S. at 598. The fact that one of the statutory aggravating circumstances had to be found before the death penalty could be imposed did not convince the plurality that the penalty was not excessive. It wrote that the aggravating circumstances "do not change the fact that the instant crime being punished is a rape not involving the taking of life." *Id.* at 599.

Justices Brennan and Marshall concurred separately, reiterating their views that the death penalty is unconstitutional *per se.* Justice Powell concurred in the judgment that the death penalty was not appropriate in this case but dissented from that portion of the plurality opinion which suggested that the death penalty for rape would be excessive in all cases. Justices Burger and Rehnquist joined in dissent.

While S. 114 would eliminate the death penalty for rape, it would permit imposition of the penalty for treason and espionage if one of three aggravating factors was found to exist: (1) prior conviction of treason or espionage punishable by death or life imprisonment; (2) knowingly creating a grave risk of substantial danger to the national security; or (3) knowingly creating a grave risk of death to another person. In addition, the bill limits the instances in which the death penalty may be applied for espionage to those in which the information furnished involves nuclear weapons, spacecraft or satellites, early warning systems, or similar protections against large-scale attack, or war plans, communications intelligence, cryptographic information, or information on major weapons systems or defense strategy.

To determine whether the imposition of the death penalty is constitutional with respect to these offenses, one must determine whether it makes a measurable contribution to acceptable goals of punishment and whether it is excessive in proportion to the crime. While there as yet is no satisfactory resolution of the debate over the deterrent effect of the death penalty, it is reasonable to assume that a court will give deference to the legislative judgment on the deterrent effect as long as this judgment appears rational.

The second part of the test, whether the punishment is excessive with respect to the crime, is more difficult to assess. In *Coker*, the Court looked to the consensus among the states and the international community and the practice of juries in modern times, as well as to historic practice, to assess the relationship between the penalty and the offense. This is more difficult with respect to crimes as rare as treason and espionage of the magnitude covered in S. 114.

Reference to the practice of the states is not particularly instructive in this instance. While some states include provisions relating to espionage or treason within their criminal codes,[18] the crimes have generally been considered federal in nature. Thus, the judgment of state legislatures as to whether the death penalty is appropriate would seem to carry less weight with respect to these crimes than was the case with respect to rape.

Federal law has permitted the death penalty for treason since 1790 and for espionage since 1917. However, of the 33 federal executions carried out from 1930 to 1970, only two were for espionage—the Rosenbergs—and there were none for treason although the imposition of the death penalty for treason was specifically upheld in *Kawakita* v. *United States*, 343 U.S. 717, 745 (1952). There were also six executions for the related crime of sabotage in 1942. The federal experience, then, is limited in practice and provides little guidance apart from the consistency with which statutory law has authorized the penalty.

The attitude of the international community demonstrates some consistency in viewing the death penalty as appropriate for these particular crimes. In a report on capital punishment to the United Nations, the Secretary General noted that many nations which have generally abolished capital punishment retain it for a few exceptional crimes such as those related to the security of the state. U.N. Economic and Social Council, *Capital Punishment: Report of the Secretary General*, para. 18, U.N. Doc. E/5242 (1973). More specifically, the report notes, "The most common exceptional crimes punishable by death are treason and crimes relating to the security of the State." *Id.* at para. 32. Tables appended to the report show that the majority of member nations of the United Nations retaining capital punishment—about 100—and that 15 other nations, while abolishing capital punishment for ordinary crimes, retain it for exceptional crimes. *Id.* at Annex 1, 2–3. A 1975 update of this report shows that the picture remains largely unchanged. U.N. Economic and Social Council, *Capital Punishment: Report of the Secretary General*, U.N. Doc. E/5616 (1975) Annex 1, 2–3. While the practice in other nations is not conclusive in interpreting the requirements of our own Constitution, it does constitute a factor which courts may well consider in determining whether the penalty of death is excessive as applied to treason or espionage.

Approaching the question as did the Court in *Coker*, the consistent view of Congress from the earliest days of the nation, and the agreement of most nations in the world today that treason warrants the death penalty in some cases, strongly argues for the conclusion that the penalty is not grossly disproportionate to the offense. This is particularly true in light of the aggravating factors in S. 114 that must be proved beyond a reasonable doubt before the penalty could be imposed. Applying these same criteria, it is likely that a court would find the death penalty for treason to be constitutional if imposed in accordance with the procedures established in S. 114.

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[18] As reported in Bedau, Death Penalty in America, p. 43 (1967), 21 states included treason among capital crimes.

Although the result is less clear with respect to the offense of espionage, as it is limited in S. 114, it too would likely be upheld. The espionage laws, however, do have an attribute not common to other capital offenses. In this particular area there are numerous reasons why the government might elect not to prosecute even the most aggravated act. Prosecution might require the disclosure of sensitive foreign intelligence and counterintelligence surveillance techniques. Or, it might compromise confidential informants or liaison relationships with foreign governments. At least until comprehensive "graymail" legislation is passed, there is also the significant possibility that prosecution will be frustrated by requirements that highly classified information be disclosed in court, or that the truth or falsity of sensitive information be confirmed by the government. Apart from evidentiary problems, espionage prosecutions invariably raise questions of foreign policy, and in some cases prosecution will be eschewed in favor of some political accommodation with a foreign government as proved recently to be the case with Soviet spies. These and other reasons render espionage prosecutions rare, and raise a question whether on close examination the Supreme Court would find the imposition of capital punishment for this crime to be so rare—and so "freakish"—as to run afoul of the *Furman* reasoning.

In addition to treason and espionage, disproportionality questions may arise as to those crimes in which a death unintentionally results. S. 114, as did the prior legislation, retains authorization for imposition of the death penalty for a number of federal felonies in which death results, even if there is no finding that the defendant committed the crime with the conscious purpose of causing death. That a legislature has authority to enact felony-murder statutes is beyond constitutional challenge. But, as Chief Justice Burger pointed out in *Lockett,* "the definition of crimes generally has not been thought automatically to dictate what should be the proper penalty." 438 U.S. at 602. Together with *Coker,* Justice White's opinion in *Lockett* (concurring in part and dissenting in part) raises questions as to the use of capital punishment for these crimes. In concurring in the judgment of the Court, Justice White states that he would hold that death may not be inflicted for killing consistent with the Eighth Amendment without a finding that the defendant engaged in conduct with the conscious purpose of producing death.[19] He explained:

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[19] If Justice White's analysis were to be adopted, the requirement in S. 114 that the defendant prove by a preponderance of the evidence the mitigating factor that he "could not reasonably have foreseen that his conduct in the course of the commission of murder, or other offense . . . would cause, or would create a grave risk of causing, death to any person" also may raise constitutional issues. *See Mullaney* v. *Wilbur, supra* note 15.

> The value of capital punishment as a deterrent to those lacking a purpose to kill is extremely attenuated. Whatever questions may be raised concerning the efficacy of the death penalty as a deterrent to intentional murders—and that debate rages on—its function in deterring individuals from becoming involved in ventures in which death may unintentionally result is even more doubtful. Moreover, whatever legitimate purposes the imposition of death upon those who did not intend to cause death might serve if inflicted with any regularity is surely dissipated by society's apparent unwillingness to impose it upon other than an occasional and erratic basis. . . .
>
> Under those circumstances the conclusion is unavoidable that the infliction of death upon those who had no intent to bring about the death of the victim is not only grossly out of proportion to the severity of the crime but also fails to contribute significantly to acceptable or, indeed, any perceptible goals of punishment.

438 U.S. at 625-26.

Justice Blackmun, commenting on Justice White's analysis, conceded that it might be that to inflict the death penalty in some such situations would skirt the limits of the Eighth Amendment proscription against gross disproportionality, but doubted that the Court could arrive at a workable disproportionality approach. The plurality, in view of its holding that Lockett was not sentenced in accord with the Eighth Amendment, did not address her contention that the death penalty is constitutionally disproportionate for one who has not been proved to have taken life, or to have attempted to take life, or to have intended to take life. *Id.* at 609 n.16.

6. Lack of Automatic Appellate Review

S. 114 would add a new section to Title 18—§ 3742—which would provide that the sentence of death shall be subject to review by the court of appeals upon appeal by the defendant. Such review would have priority over all other cases. S. 1382 contained a similar provision; H.R. 13360 provided for automatic review of all death sentences. In light of the Court's emphasis on the automatic review provision in *Gregg,* and the broadened discretion exercised by sentencers under *Lockett,* the question arises whether review at the behest of the defendant is an adequate safeguard against the random or arbitrary imposition of the death penalty.

In *Gregg,* the plurality stated that the requirement that the state supreme court review every death sentence is an added safeguard that the penalty will not be imposed on a capriciously selected group of convicted defendants. In particular, the Court noted that the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. 428 U.S. at 206. In his concurrence, Justice White, joined by the Chief Justice and Justice Rehnquist, stated that the provision for appellate review is an important aspect of the legislative scheme. He noted that to assist it in deciding whether to sustain the death penalty, the state supreme court is supplied, in every case, with a report from the trial judge in the form of a standard questionnaire. The Texas statute at issue in *Jurek*, however, provided for review by appeal of the defendant. In concluding that the Texas capital sentencing procedures do not violate the Eighth and Fourteenth Amendments, the Court stated that "[b]y providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law." 428 U.S. at 276.

In our view, it is unlikely that the Court would overturn a statute because it failed to provide for automatic review. The need to ensure that the death penalty is not "wantonly and freakishly" imposed even if the defendant refuses to appeal, and the need to review *all* death sentences in the jurisdiction adequately to determine disproportionality, are, however, important congressional considerations.[20]

These are the central constitutional questions which would likely be raised in litigation should S. 114 be enacted. They are also the issues that should be explored if the Department elects to urge the Senate to submit this bill to the Judiciary Committee for further review.

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[20] The critical role of appellate review is underscored by the *Godfrey* decision, in which the Court followed the principle set down in *Gregg*, that arguably vague and overbroad language is not facially unconstitutional because it cannot be assumed that a state supreme court will adopt an open-ended construction. In addition, Justice Marshall noted in his concurrence in *Godfrey* that since *Gregg* only three persons have been executed and two of them made no effort to challenge their sentence.

Presidential Authority To Use Funds From the United States Emergency Refugee and Migration Assistance Fund

The United States Emergency Refugee and Migration Assistance Fund, established by § 2(c) of the Migration and Refugee Assistance Act of 1962, is available to cover the administrative costs of processing a recent influx of Cuban migrants to the United States, even though they have not been classified as refugees and are thus ineligible for assistance under other programs authorized by the Act.

Congress intended the President to have discretion to use the Fund for any emergency situation involving unexpected refugee and migration needs, whenever and wherever it occurs.

June 5, 1980

MEMORANDUM OPINION FOR THE DEPUTY GENERAL COUNSEL, OFFICE OF MANAGEMENT AND BUDGET

This responds to your inquiry asking whether the President is authorized to use money from the United States Emergency Refugee and Migration Assistance Fund ("the Fund"), 22 U.S.C. § 2601(c)(2), to cover the administrative costs of processing the recent influx of Cuban citizens. Presidential Determination No. 80-18, 45 Fed. Reg. 29,787 (1980). We believe that the Fund is available to meet the needs of these Cuban citizens and that the President properly exercised his authority in issuing Determination No. 80-18. The State Department has come to the same conclusion.

The Migration and Refugee Assistance Act of 1962 (the Act), 22 U.S.C. § 2601 *et seq.*, was passed while the wave of Hungarian refugees was still fresh and during one of the first waves of Cuban emigration. As originally enacted, § 2(c) of the Act, 22 U.S.C. § 2601(c) was intended to give the President authority to use up to $10 million from his foreign aid contingency fund to meet such unexpected problems:

> Section 2(c) of the bill would authorize the President to use not to exceed $10 million in any fiscal year in order to meet unexpected refugee and migration developments when the President determines such use to be important to the national interest. Experience since World War II teaches that international tensions and Communist efforts to increase such tensions will result in escapee and refugee

> problems. These situations may arise suddenly and it is impossible to predict where trouble may come. The bill recognizes the necessity of being prepared for such eventualities by the inclusion of the emergency provision just referred to.

S. Rep. No. 989, 87th Cong., 1st Sess. 3 (1962). *See also* H.R. Rep. No. 1369, 87th Cong., 2d Sess. 48 (1962) (H.R. 10079) ("These problems arise suddenly and it is often impossible to predict where and when the problems may arise.") [1]; H.R. Rep. No. 1066, 87th Cong., 1st Sess. 27–28 (1961). The legislative history of the Act indicates that the Fund could be used inside or outside the United States:

> The President of the United States has the authority now under the contingency fund to earmark whatever moneys he thinks are necessary in emergency situations. [The influx of Cubans] is a difficult problem for us to deal with. The President has dealt with it on an emergency basis by making available for Dade County, Fla., sufficient funds to reimburse [the county]. All this bill does is to write the same provision in the law, spell it out, so that in the event it is necessary in our judgment to cope with this sort of problem, it can be dealt with openly and everybody knowing exactly what we are doing, pursuant to congressional authorization and appropriation of funds.

108 Cong. Rec. 3384 (1962) (remarks of Rep. Walker, floor manager). It is clear, therefore, that Congress foresaw that one of the immediate—and continued—uses of the Fund would be to aid individuals of uncertain status within the United States.

This analysis of the scope of § 2(c) is not affected by the fact that § 2(b) of the Act is limited to refugees. Sections 2(b) and 2(c) were designed to meet different needs. Section 2(b) consisted of the continuation of membership in various international refugee organizations, 22 U.S.C. § 2601(b)(1) (Supp. IV 1959–62), the continuation of a program for escapees from Communist countries, *id.* § 2601(2), and the regularizing of aid to refugees within the United States. *Id.* § 2601(b)(3)–(6). *See* H.R. Rep. No. 1066, *supra,* at 12–27. Section 2(b)(3)–(6)'s aid was limited to those who met its definition of refugee, 22 U.S.C. § 2601(b)(3) (Supp. IV 1959–62), one almost identical to that of the Refugee Act of 1980. Section 2(c) permitted the President to provide "economic assistance" of up to $10 million from the contingency fund of the Act for International Development of 1961 for "unexpected refugee *and migration* developments . . . ." H.R. Rep. No. 1066, *supra,* at 27, 28 [emphasis added]. This contingency fund, in turn, was meant to be used "with broad discretion" by the President "to meet requirements which are either completely unforeseen or which are identified but without enough precision to warrant inclusion in one of the other categories." *Id.* at 27, quoting from H.R. Rep. No. 851, 87th Cong., 1st Sess. 48 (1961) (contingency fund authorization). Migration is not defined in 22 U.S.C. § 2601.[2] We have found no evidence that Congress intended to limit the President's ability to aid migrants on an emergency basis, although aid to them individually was not covered in § 2(a) or (b). We do not believe, therefore, that the use of the emergency fund in § 2(c) is tied to the express provisions of § 2(a) or (b). The Fund is discretionary—for any emergency situation involving "unexpected urgent refugee and migration needs" whenever and wherever they occur. 22 U.S.C. § 2601(c) (Supp. IV 1959–62). *See also* H.R. Rep. No. 1369, *supra,* at 48.

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[1] The Act and H.R. 10079 did not differ from each other except for one provision which is not relevant here. H.R. Rep. No. 1923, 87th Cong., 2d Sess. 4 (1962).

The 1975 amendments, which created a standing fund in place of the transfer authority described above, did nothing to change this analysis. The President's discretion was reaffirmed. Assistance was to be "on such terms and conditions as he may determine. . . ." 22 U.S.C. § 2601(c)(1) (1976). Expenditures would not need prior statutory approval:

> Once created through this authorization and the necessary appropriation, the Fund would be available to meet emergency needs as determined by the President. For specific uses of the Fund, Congressional oversight would be retrospective, with justification being sent to the foreign affairs and appropriations committees after the event. Over the longer run, however, the need for appropriations to replenish the Fund should enable Congress to maintain control and effective oversight.

S. Rep. No. 337, 94th Cong., 1st Sess. 23–24 (1975).

The Refugee Act of 1980 did not change this framework. It did remove the care of refugees in the United States from § 2(b). Refugee Act of 1980, § 312(b)(1). It did not, however, make any change in the President's use of the § 2(c) Fund except to raise the amount of money available. *Id.,* § 312(b)(2). A provision in H.R. 2816, which would have limited use of the Fund to those within the United States, was deleted from the final bill without explanation. The House did recognize that emergency funds from § 2(c) have been used within the United States for individuals of uncertain status. H. Rep. No. 608, 96th Cong., 1st Sess. 4 (1979).

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[2] The Intergovernmental Committee for European Migration, 6 U.S.T. 603, 207 U.N.T.S. 189, referred to in 22 U.S.C. § 2601(b)(1), does not define the term. It does, however, make clear that refugees are only one kind of migrant. Annex, ¶ 4, 6 U.S.T. at 615, 207 U.N.T.S. at 210. Migrate is defined in Webster's New International Dictionary (2d ed. 1957) as: "To go from one place to another; esp., to move from one country, region, or place of abode or sojourn to another, with a view to residence; to move; as, the Moors who *migrated* from Africa into Spain."

We believe that the legislative history of 22 U.S.C. § 2601(c) indicates a longstanding congressional intent to permit the President to use the Fund for purposes other than those specifically listed in 22 U.S.C. § 2601(a) and (b). Since the Refugee Act of 1980 did not amend the language of 22 U.S.C. § 2601(c)(1), money in the Fund may continue to be used within the United States to aid Cubans who have not yet been classified as refugees.

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Use of Law Enforcement Assistance Administration Program Grant Funds for Administrative Purposes

Funds originally awarded to states by the Law Enforcement Assistance Administration for programmatic purposes, under Title I of the Omnibus Crime Control and Safe Streets Act of 1968, may be used to supplement exhausted administrative funds.

A lump sum appropriation can be used for any purpose consistent with the purposes of the authorizing statute, and an agency's representation to Congress as to how it proposes to allocate appropriated funds is legally binding on the agency only to the extent its proposed allocation finds its way into the language of the appropriation statute itself.

June 5, 1980

MEMORANDUM OPINION FOR
THE DEPUTY ATTORNEY GENERAL

This responds to your request for our opinion on the question whether the states may be permitted to use a portion of certain unexpended federal grant funds in their possession for purposes other than those for which they were originally intended. We conclude that they may.

The funds in question have been awarded to the states over the past several years pursuant to agreements with the Law Enforcement Assistance Administration (LEAA) under Title I of the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3701–3796 (1976) (hereafter Crime Control Act).[1] Under the terms of these agreements, certain sums have been awarded to the states for administrative or planning purposes under Part B of the Crime Control Act, 42 U.S.C. §§ 3721–25, and certain sums for programmatic purposes under Parts C and E of that Act, 42 U.S.C. §§ 3731–39, 3751–74. By the end of the present fiscal year funds awarded under Part B for administrative purposes will have been entirely obligated by the states; however, there will remain to be administered and expended over the next two years some $600 million in programmatic funds awarded under Parts C and E.[2] The practical necessity of devoting some portion of these funds to administration has arisen because of Congress' tentative decision to appropriate no new monies for any formula grant awards by LEAA for FY 1981. The question is whether LEAA's agreements with the states can now be modified to permit states to use funds originally awarded for programmatic purposes to supplement their exhausted administrative funds.

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[1] Funds were awarded by LEAA to the states for FY 1980 in accordance with categories established by the Justice System Improvement Act of 1979, Pub. L. No. 96–157, 93 Stat. 1167 (hereafter 1979 Act). However, this Act was not passed by Congress until after the beginning of the 1980 fiscal year, so that awards which had already been made for FY 1980 were made under authority of the Crime Control Act. Transition provisions in the 1979 Act intended to facilitate the shift to a new award system provided authority for LEAA to award funds already appropriated "in accordance with the provisions of the prior Act . . . ." H.R. Rep. No. 655, 96th Cong., 1st Sess. 80 (1979) (conf. rep.). *See* § 1301 (d), (f), (h) of the 1979 Act, 93 Stat. 1167, 1221.

The statutory provisions authorizing LEAA to make grants under Parts B, C, and E of the Crime Control Act set no relevant limits on the amount of money which LEAA can lawfully allocate to each Part.[3] In theory, LEAA could, consistent with its authorizing act, enter into agreements with states under which grant funds could be used either for administration and planning *or* for programmatic purposes. There is, therefore, no obstacle in the authorizing statute to using some programmatic funds for administrative purposes.[4]

Nor do LEAA's appropriation statutes constrain it in this regard. LEAA's is a lump sum appropriation, and as such can be used for any purpose consistent with the purposes of the authorizing statute. *See, e.g., In re Newport News Shipbuilding & Drydock Co.,* 55 Comp. Gen. 812, 819–21 (1976). An agency's representation to Congress as to how it proposes to allocate appropriated funds is legally binding on the agency only to the extent that its proposed allocation finds its way into the language of the appropriation statute itself. Nothing in the language of LEAA's appropriations acts for the past three years suggests that funds awarded under Part B for administrative expenses could not be increased by agreement between LEAA and a particular state, or that obligated funds originally earmarked for programmatic purposes could not in the same manner be shifted to administration if necessary.

In sum, we see no bar either in the authorizing statute or the appropriations acts to LEAA's entering into a modification of its grant agreements whereby the states will be permitted to use funds previously designated for programmatic purposes to accomplish necessary administrative tasks.

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[2] Under § 520 of the Crime Control Act, 42 U.S.C. § 3768, funds appropriated under Title I remain available for obligation until expended. Under the terms of LEAA's agreements with the states, funds not obligated by the states by the end of the third year after their appropriation, revert to LEAA.

[3] Section 205 of the Act provides for a minimum sum to be awarded every state under Part B, with "the remainder of such funds available" allocated among the states in accordance with a formula based on population. 42 U:S.C. 3725. Section 520(a) provides that the sum allocated by LEAA to Part E will be no less than 20 percent of the amount allocated to Part C. 42 U.S.C. § 3768(a). Other than these two provisions, however, there is nothing in this authorizing statute which obligated LEAA to allocate appropriated funds among Parts B, C, and E in any particular manner.

[4] The 1979 Act does set a ceiling on funds to be allocated for administrative purposes, *see* § 401(c)(1), 93 Stat. 1167, 1181. However, since none of the money in question was appropriated under authority of that Act, *see* note 1 *supra,* this ceiling would pose no obstacle to modifying agreements entered into under authority of the Crime Control Act.

Section 8 of the Department of Justice Appropriation Authorization Act for Fiscal Year 1980, Pub. L. No. 96-132, 93 Stat. 1040, 1046-47 (1979), contains a provision requiring each organizational component of the Department of Justice to give 15 days notice to specified congressional committees of any decision to "reprogram" funds in excess of a certain amount. In the case of LEAA, this amount is $500,000. Under the terms of the statute, notification must be given whenever funds are shifted within an agency from one "program" to another, as that term is defined in the Department of Justice's submission to Congress in support of its authorization request. The notification requirement would apply, therefore, when LEAA shifts funds from one line item in its authorization submission to another, even though LEAA's appropriation itself is in a lump sum.[5] While the present situation could perhaps be distinguished from the more typical agency "reprogramming" action, some public action by LEAA will be necessary in any event to permit the states to accomplish the desired shift of programmatic funds. We therefore think that the appropriate congressional committees should be notified of LEAA's intention to take this course of action.

Larry L. Simms
Deputy Assistant Attorney General
Office of Legal Counsel

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[5] This notification requirement is discussed in the committee reports on the Justice Department's appropriation statute for 1980. *See* S. Rep. No. 251, 96th Cong., 1st Sess. 8 (1979); H.R. Rep. No. 247, 96th Cong., 1st Sess. 6 (1979).

Cuban Obligation to Accept Returning Nationals

Under customary international law, one state has a duty to another state to accept any of its own nationals who have been expelled from the other state. This duty between states to accept returning nationals is reinforced by a number of international instruments under which individuals have a right to return to their own country.

Cuba's obligation to accept its returning nationals is intensified by evidence that it violated international law in expelling them in the first place.

June 6, 1980

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds to your request for our views, on an urgent basis, on Cuba's obligation to accept the return of Cuban nationals who have been excluded from the United States.

Our examination of authorities indicates that a case can be made that Cuba has a duty to take any of its nationals that we may expel. A leading international law treatise states the obligation quite clearly:

> The duty [of the State] is that of receiving on its territory such of its citizens as are not allowed to remain on the territory of other States. Since no State is obliged by the Law of Nations to allow foreigners to remain within its boundaries, it may, for many reasons, happen that certain individuals are expelled from all foreign countries. The home State of expelled persons cannot refuse to receive them on the home territory, the expelling States having a right to insist upon this.

1 Oppenheim, International Law § 294 (Lauterpacht ed. 1948).

This duty between states is reinforced by a number of international instruments adopted in recent years concerned with the rights of individuals.

In 1948 the United Nations faced this question when the General Assembly adopted, without dissent,[1] the Universal Declaration of Human Rights. Article 13(2) provides:

> Everyone has the right to leave any country, including his own, and to return to his country.

G.A. Res. 217A(III), 1948–49 U.N.Y.B. 535–37.

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[1] Cuba was a U.N. member at that time.

Although the Declaration is not a binding treaty, it has frequently been cited as a source of customary international law.

Similarly, two major human rights treaties provide that a national cannot be deprived of the right to enter his own country, the American Convention on Human Rights "Pact of San Jose, Costa Rica," Art. 22.5[8] and the International Covenant on Civil and Political Rights, Art. 12.4.[9] Cuba is not a party to either; President Carter has signed both and sent them to the Senate but the United States is not a party. Ex. E, 95th Cong., 2d Sess., Ex. F, 95th Cong., 2d Sess., Feb. 28, 1978. The treaties are both in force, however, and have been ratified by a significant number of countries. In such a situation it can be argued that the right to return to a national's own country has been established by customary international law even as to non-parties. *Cf. The Paquete Habana*, 175 U.S. 677 (1900).

Another treaty of possible relevance is the International Convention on the Elimination of All Forms of Racial Discrimination (Ex. C, 95th Cong., 2d Sess.). Article 5 provides that parties undertake to eliminate racial discrimination in all its forms

> and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:
>
> * * * * *
>
> The right to leave any country, including one's own, and to return to one's country.

Cuba became a party to this treaty in 1972. President Carter signed it but the Senate has not approved it. One problem in citing this provision is that the Administration has taken the position that this obligation is not primarily to protect the rights included as such "but rather to assure equality and nondiscrimination in the enjoyment of those rights." Letter of Submittal to the President from Warren Christopher, sent to Senate with Ex. C, 95th Cong., 2d Sess. at VII. Thus, it does not appear that Cuba would violate this treaty unless it discriminated on racial and ethnic grounds in expulsion and acceptance of the return of nationals.

The obligation of Cuba to accept its nationals is intensified by evidence that it violated international law in expelling nationals. There is evidence that some of the persons leaving Cuba, and whom we wish deported, were forced out of Cuba in the first place. The American

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[8] "No one can be expelled from the territory of the State of which he is a national or be deprived of the right to enter it."

[9] Handbook of Existing Rules Pertaining to Human Rights in the Inter-American System, 29 (1983) (O.A.S. Inter-American Commission on Human Rights). "No one shall be arbitrarily deprived of the right to enter his own country." Official Records of the General Assembly, 21st Sess., Supp. No. 16, 52.

Convention, *supra* (Art. 22(5)), provides that no one can be expelled from the state of which he is a national, as does the American Declaration of the Rights and Duties of Man, Art. VIII. The Declaration is enforceable by the Organization of American States (OAS) Human Rights Commission, which is given its status under the OAS Charter. *See* T. Buergenthal, *The Revised OAS Charter and the Protection of Human Rights*, 69 Am. J. Int'l L. 828 (1975). Despite Cuba's suspension from OAS activities, it is still a member and the United States has taken the position that Cuba is still subject to human rights obligations.

The human rights instruments discussed are basically for the protection of the individual rather than other states. All of them recognize the possibility, however, that states may complain of violations against persons who are not its nationals.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

The President's Authority to Order Export of Special Nuclear Material Under the Atomic Energy Act of 1954

The President has the power to order exports of special nuclear material under § 126 of the Atomic Energy Act of 1954, as amended, whenever he determines that "withholding the proposed export would be seriously prejudicial to the achievement of United States non-proliferation objectives, or would otherwise jeopardize the common defense and security."

The full-scope safeguards criterion of § 128, which applies to exports of special nuclear material to non-nuclear weapon states, is binding only on the Nuclear Regulatory Commission. While the President may take into account the expression of congressional policy contained in § 128 in deciding to order an export under § 126, including its affordance of a grace period, he is not bound by it.

June 6, 1980

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This responds to your request for our opinion whether § 128 of the Atomic Energy Act of 1954, as amended by the Nuclear Nonproliferation Act of 1978, 42 U.S.C. § 2157, imposes any limitation on exercise by the President of his power under § 126(b)(2) of that Act, 42 U.S.C. § 2155(b)(2), to order export of special nuclear material for which the Nuclear Regulatory Commission (NRC) has not issued a license on the stated ground that it could not make the necessary statutory determinations. The issue arises because the NRC concluded that the grace period in § 128 did not apply to two license applications for export of special nuclear material for the Tarapur reactors in India and, therefore, the licenses could not be granted because India has not agreed to the full-scope safeguards required by § 128.[1] You also asked whether a presidential order under § 126(b)(2) that the export go forward is, in effect, also a decision that the full-scope safeguards requirement in § 128 either does not apply because of the statutory grace period or is waived by the President's action. Finally, you have requested our views on whether the President may rely on his interpretation of the grace period to order the export.

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[1] The Commission was "also unable to find that the two fuel applications satisfy the requirements of Section 127 of the Atomic Energy Act." *In the Matter of Edlow International Co.* 11 N.R.C. 680, 682 (1980).

We conclude that the full-scope safeguards criterion of § 128 is binding only on the NRC. The President may take the expression of congressional policy in § 128 into account in deciding whether to order the export but he is not bound by it.[2] The exclusive criterion binding on the President is that of § 126(b)(2) "that withholding the proposed export would be seriously prejudicial to the achievement of United States non-proliferation objectives, or would otherwise jeopardize the common defense and security."

This presidential finding is the same as that which, pursuant to § 128(b)(1), could be submitted by the President to the NRC to waive the full-scope safeguards criterion during the NRC's consideration of a license for exports to which § 128 applies. However, when the presidential finding is made under § 126 after the NRC has refused to issue a license, it is not necessarily a commentary on the full-scope safeguards criterion. Therefore, it is not necessary for the President to resolve the question whether the full-scope safeguards of § 128 apply in order to decide that the export should go forward pursuant to his finding under § 126. Of course, the President may base his conclusion "that withholding the proposed export would be seriously prejudicial to the achievement of United States non-proliferation objectives, or would otherwise jeopardize the common defense and security" on his determination that the export application comes within the spirit of the grace period concept that underlies § 128.

Section 126 provides that no license for the export of any special nuclear material may be issued by the NRC until the Secretary of State has notified the NRC that it is the judgment of the Executive branch that the proposed export will not be inimical to the common defense and security. The Secretary of State must "specifically address the extent to which the export criteria then in effect are met and the extent to which the cooperating party has adhered to the provisions of the applicable agreement for cooperation." *See* § 126(a)(1).

The NRC may grant requests for export licenses upon a determination that all applicable statutory requirements have been met. *See* § 126(b)(1). Section 126(b)(2) provides that:

> If, after receiving the executive branch judgment that the issuance of a proposed export license will not be inimical to the common defense and security, the Commission does not issue the proposed license on a timely basis because it is unable to make the statutory determinations required under this chapter, the Commission shall publicly issue its decision to that effect, and shall submit the license application to the President . . . If, after receiving the proposed license application and reviewing the Commission's

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[2] The same is true of those criteria found in § 127, 42 U.S.C. § 2156.

> decision, the President determines that withholding the proposed export would be seriously prejudicial to the achievement of United States non-proliferation objectives, or would otherwise jeopardize the common defense and security, the proposed export may be authorized by Executive order.[3]

The criteria governing exports for peaceful nuclear uses from the United States of special nuclear material are set forth in § 127, 42 U.S.C. § 2156, and involve such matters as application of International Atomic Energy Agency (IAEA) safeguards on the particular material exported, physical security measures, and limitation on retransfers. An additional criterion applicable to exports to non-nuclear weapon states[4] is that IAEA safeguards must be "maintained with respect to all peaceful nuclear activities in, under the jurisdiction of, or carried out under the control of such state at the time of export." *See* § 128(a)(1). This additional criterion, known as full-scope safeguards, applies only to an application "which is filed after eighteen months from March 10, 1978." *See* § 128(b). The full-scope safeguards requirement may be waived for applications filed after this grace period expires if the licensing agency is "notified that the President has determined that failure to approve an export to which [the full-scope safeguards criterion] applies because such criterion has not yet been met would be seriously prejudicial to the achievement of United States non-proliferation objectives or otherwise jeopardize the common defense and security." *See* § 128(b)(1). Section 128 contains a provision requiring submission of the President's determination to Congress similar to that contained in § 126.

Section 126(b)(2) gives the President broad power to order an export for foreign policy, national security or other reasons if "the President determines that withholding the proposed export would be seriously prejudicial to the achievement of United States non-proliferation objectives, or would otherwise jeopardize the common defense and security."

It might be argued that §§ 127 and 128 apply to all U.S. exports of special nuclear material and thus limit exercise of the President's power under § 126. Section 127 states that "[t]he United States adopts the following criteria which, in addition to other requirements of law, will govern exports." Section 128(a) provides that "no such export" shall be made unless it meets the criteria; the President is charged with seeking to achieve adherence to the criteria.[5] We believe, however, that reading the criteria in §§ 127 and 128 as binding on the President would be incompatible with the President's responsibilities set forth in § 126. Our view is supported by members of the NRC, who have continuously and repeatedly recognized that the President's power under § 126 is not constrained by the criteria set forth in §§ 127 and 128.[6] As was explained by the Deputy to the Undersecretary of State for Security Assistance, Science and Technology, when he testified before the House Subcommittee considering the non-proliferation Act, "[w]e sometimes make the mistake of assuming that nuclear export policy and nonproliferation policy are the same thing. They are clearly not. Nuclear export policy is only part of the larger nonproliferation policy." [7]

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[3] This section provides that the executive order shall be submitted to Congress for 60 days of continuous session and the export shall not occur if, during the 60 days, Congress passes a concurrent resolution opposing it. We do not now comment on the constitutionality of this legislative veto provision.

[4] A non-nuclear weapon state is one that did not explode a nuclear explosive device prior to January 1, 1967. Article IX, Treaty on the Non-Proliferation of Nuclear Weapons, *opened for signature* July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161 (entered into force March 5, 1970). India falls in this category because it did not explode such a device until 1974.

In sum, it is our conclusion that the President is empowered to order the export of special nuclear material to India in response to the pending applications upon his determination "that withholding the proposed export would be seriously prejudicial to the achievement of United States non-proliferation objectives, or would otherwise jeopardize the common defense and security." *See* § 126(b)(2). That is the sole condition for the exercise of the President's power.

The President may base this presidential finding on his conclusion that the export applications in question come within a grace period concept which is a part of the United States policy on non-proliferation and which formed the basis for the exception embodied in § 128 to the full-scope safeguards criterion for NRC-licensed exports.[8] The President is free to reach this conclusion notwithstanding the NRC decision that, under its interpretation of § 128, the statutory requirements for the NRC to find an exception to the full-scope safeguards criterion have not been met. That NRC decision is irrelevant to the question of the President's authority under § 126 to order this export. Section 128 simply does not restrict the President's authority.

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

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[5] The House Report on the Act states that the criteria "will apply uniformly to all U.S. nuclear exports." H.R. Rep. No. 587, 95th Cong., 1st Sess. 23 (1977). The same Report explains, however, that the bill "will insure that when all statutory standards have been met, export licenses will be issued—or, if the judgment of the Executive Branch and the independent Nuclear Regulatory Commission should differ, that a workable mechanism exists for resolving the dispute." *Id.* at 6.

[6] *See, e.g.*, Separate Views of Commissioners Gilinsky and Bradford on XSNM-1222, 9 NRC 209, 251 (1979); Separate Views of Commissioners Bradford and Gilinsky on XSNM-1060, 7 N.R.C. 436, 445 (1978); Statement of J. Hendrie, Chairman, NRC, S. Rep. No. 467, 95th Cong., 1st Sess. 112 (1977).

[7] *The Nuclear Antiproliferation Act of 1977, Hearings on H.R. 8638 Before the Subcomms. on International Security and Scientific Affairs and on International Economic Policy and Trade of the House Comm. on International Relations*, 95th Cong., 1st Sess. 108 (1977).

[8] The statute itself contemplates that the President will state the reasons for his action in his communication to Congress. Section 126(b)(2) requires submission to Congress of the "Executive order, together with his explanation of why, in light of the Commission's decision, the export should nonetheless be made."

Effect of 31 U.S.C. § 484 on the Settlement Authority of the Attorney General

A proposal whereby sums received in settlement of a suit brought by the United States and the Commonwealth of Virginia for environmental damage resulting from an oil spill would be donated to a waterfowl preservation organization, is barred by 31 U.S.C. § 484, which requires that all money received for the use of the United States be deposited in the Treasury. This requirement furthers the constitutional goal of reserving to Congress responsibility for determining whether and how public funds are to be spent.

While the Comptroller General has found § 484 inapplicable in situations where the funds involved are received in trust for a particular purpose, this theory is usually insufficient to override the mandate of § 484 where the trust is created by nonstatutory executive action.

In this case, where the United States has not incurred any monetary loss as a result of the oil spill, § 484 would not be offended by a settlement that attributed the entire sum received to its co-plaintiff, which could then direct the money to a charity.

June 13, 1980

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

This responds to your request for our views concerning the Justice Department's authority to approve the proposed settlement in *In re Complaint of Steuart Transportation Co., etc.* (E.D. Va.-Civ. No. 76-697-N). For the reasons discussed below, we conclude that the settlement as proposed is barred by 31 U.S.C. § 484 (1976). However, it would be possible to modify the settlement in this case to achieve the same result without violating § 484.

In our view, the issues surrounding your authority to compromise this suit derive from more fundamental questions involving the extent of executive authority to bring nonstatutory suits on a public trust/*parens patriae* theory.[1] However, we do not address the question of independent executive authority to sue in this memorandum because we feel that the court's opinion has effectively mooted the question for purposes of this suit.[2] Instead, we will focus on the legal implications of the proposed disposition of money damages obtained in this suit either through settlement or final judgment.

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[1] The government should consider the same questions of authority when it fashions its initial claim for relief as when it negotiates the settlement decree. In this case the government would address the same issues regarding disposition of money whether it received a damages award pursuant to a consent decree or a final judgement after trial.

[2] Although the court's opinion in *Steuart* clearly finds authority for the public trust/*parens patriae* action, it does not indicate whether this authority resides in the federal or state plaintiff (or in both). *See* 495 F. Supp. 38, 40 (E.D. Va. 1980).

I. Facts

The United States and the Commonwealth of Virginia have sued Steuart Transportation Company alleging that it caused an oil spill in the Chesapeake Bay. Each sovereign sought: (1) damages for the death of migratory waterfowl, (2) statutory penalties, and (3) cleanup costs (including pre-judgment interest). One aspect of the proposed settlement is that the federal and state government would share an entitlement to damages for the death of the waterfowl.[3] Under the terms of the settlement, this money would be "donated by Steuart" to a waterfowl preservation organization to be designated jointly by the State of Virginia and the U.S. Department of the Interior. The State of Virginia has notified us that it is ready to approve the proposed settlement.

II. Discussion

The Constitution commits to the legislative branch of government control over public expenditures. U.S. Const. Art. I, § 8, cl. 1; *id.*, Art. I, § 9, cl. 7. Congress has passed various statutes designed to ensure that congressional prerogatives under this constitutional scheme are not diminished by executive action.[4] Of particular significance is 31 U.S.C. § 484, which provides that:

> The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided in section 487 of this title, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever.

The sponsor of § 484's predecessor statute indicated in House floor debates that the original statute was intended to "carry out both the spirit and letter of the Constitution." Cong. Globe, 30th Cong., 1st Sess. 466 (1848) (remarks of Rep. McKay). Representative Toombs, another supporter of the original bill, explained its purpose and constitutional underpinnings as follows:

> This bill sought simply to put all the money into the public treasury, and draw it from the public treasury by law, according to the requirements of the Constitution, so

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[3] The government originally claimed damages for the waterfowl on a *parens patriae* theory, but it did not seek criminal penalties under the Migratory Bird Treaty Act, 16 U.S.C. § 707.

[4] *See, e.g.*, 41 U.S.C. §§ 11-14 concerning public contracts.

> as to get rid of the difficulty of spending two or three millions without authority of law, as we now did.

Id. at 475.

The opinions of the Comptroller General construing § 484 tend to emphasize the prerogatives of the Congress and find exceptions to application of § 484 only when supported by a clear expression of congressional intent. For example, on several occasions the Comptroller General has ruled that funds derived from vending machines on government-owned or -controlled property may not be used for employee recreation or welfare activities but must be deposited in the Treasury pursuant to § 484. 32 Comp. Gen. 124 (1952); 32 Comp. Gen. 282 (1952). On the other hand, the Comptroller General has found § 484 inapplicable in situations where a legislative scheme implied a congressional intent to make particular programs self-sustaining. *See, e.g.*, 22 Comp. Gen. 1133 (1943) (War Materials Insurance Program), 23 Comp. Gen. 652 (1944) (Soil Conservation Act), 24 Comp. Gen. 847 (1945) (Lend Lease Act).

The Comptroller General also has recognized a distinction between trust funds and other monies received for the United States for purposes of § 484. For example, in 51 Comp. Gen. 506 (1972), the Comptroller General noted that revenues generated by the Smithsonian in operating the National Zoo were revenues derived from the use of both appropriated funds and Smithsonian trust funds. Despite the fact that the bulk of the administration of zoo operations is supported by appropriated funds, the Comptroller General agreed that § 484 need not apply to zoo operations so long as full disclosure is made to the Congress of the gross amount of all receipts realized from zoo activities that are supported by appropriated funds.[5] The Comptroller General has also indicated in dictum that § 484 would not require that money received by the United States in trust for a particular purpose be deposited in the Treasury. 27 Comp. Gen. 641 (1948). However, in that case the Comptroller General carefully scrutinized the underlying law and facts and determined that no proper and legal trust had in fact been created. Accordingly, the Comptroller General ruled that the money must remain in the Treasury unless and until Congress appropriated it for a particular purpose.

The Office of Legal Counsel has also read § 484 to have a fairly broad application. For example, we have advised the Federal Bureau of Investigation (FBI) that, absent legislation to the contrary, money generated by FBI undercover operations must be considered money "received . . . for the use of the United States" and must be deposited in the Treasury pursuant to § 484. We have also advised that Freedom of Information Act fees collected by the FBI must be deposited in the Treasury. However, like the Comptroller General's trust opinions, we have recognized that § 484 should not be applied to money given to the government which is not available to the United States for disposition on its own behalf. Thus, we advised that money received by the FBI from an insurance company to purchase a stolen car is not subject to § 484. We have also advised that money received by private entities working with the government may not be subject to § 484.[6]

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[5] The Comptroller's analysis applying § 484 only to revenues that are derived entirely from the use of appropriated funds is likely to be *sui generis* to the zoo opinion. In any event, this analysis is difficult to apply in the *Steuart* context, where the *parens patriae* litigation was supported by appropriated funds, but the subject of compensation (the birds) was not.

There are no judicial precedents construing § 484 that would assist us in analyzing the *Steuart* case. However, the Ninth Circuit held in *Emery* v. *United States*, 186 F.2d 900, 902 (9th Cir. 1951) that money for rental overcharges paid by landlords to the Treasurer of the United States pursuant to a court order was held by the government in trust for the tenants. Since the money held in trust did not involve any appropriation by Congress, the court concluded that payment of the money by the United States to individual tenants would not be an unlawful appropriation in violation of Article I, § 9 of the Constitution. Similarly, in *Varney* v. *Warehime*, 147 F.2d 238, 245 (6th Cir. 1945), the Sixth Circuit held that assessments against milk handlers to cover the expenses of the War Food Administration were trust funds which need not be deposited in the Treasury.

Applying these precedents to the settlement of the *Steuart* waterfowl claim, we believe that there are two theories that could be asserted to defend a settlement that did not direct the money into the federal Treasury, as generally required by § 484. The first theory would be that the money was received in trust for the people of Virginia or the United States. The second theory would be that under the terms of the settlement no money was "received" at all.

The argument under the trust theory could be based upon the terms of the settlement (which could explicitly purport to create a trust), the two Comptroller General opinions cited above which recognize exceptions to the application of § 484 to *bona fide* trusts, and the two circuit court cases that find no constitutional infirmity in the use of funds received in trust by the Executive without explicit legislative authorization of the expenditure.[7] The weaknesses of a trust argument are: (1) that trusts created by nonstatutory executive action could indeed be used to circumvent legislative prerogatives in the appropriations area; (2) that to some extent all money held in the Treasury or recovered by the United States in litigation is received "in trust" for the citizenry; and (3) that Congress has created or recognized trust funds explicitly in numerous cases [8] and implicitly in others,[9] but it has neglected to do so in this context.[10] On balance, we must conclude that the trust argument is insufficient in this case to override the legislative mandate of § 484.

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[6] There are also Comptroller General precedents to this effect. *See* 44 Comp. Gen. 87 (1964) (involving an entity established with federal funds but maintained through grants from a state university).

[7] There is also some weak legislative history to § 484's predecessor statute from which it could be argued that at the time the original statute was enacted, Congress recognized that trust funds were different from other public funds. *See* debate on the amendment proposed by Representative Hall, Cong. Globe, 30th Cong., 1st Sess. 466 (1848).

Under the settlement as it is presently structured, we must also reject the argument that § 484 does not apply because no money has been received. In our view, the fact that no cash actually touches the palm of a federal official is irrelevant for purposes of § 484, if a federal agency could have accepted possession and retains discretion to direct the use of the money. The doctrine of constructive receipt will ignore the form of a transaction in order to get to its substance. Although this doctrine originally developed in the context of tax cases, *see, e.g.*, *Bennett* v. *United States*, 293 F.2d 323 (9th Cir. 1961) and *Pittsburgh-Des Moines Steel Co.* v. *United States*, 360 F. Supp. 597, 600–601 (W.D. Pa. 1971), it should apply in this context as well, if § 484 is to be given any practical effect.[11] Since we believe that money available to the United States and directed to another recipient is constructively "received" for purposes of § 484, we conclude that the proposed settlement is barred by that statute.

On the other hand, we do not believe that § 484 would be offended by a settlement that attributes the entire sum of money received to our co-plaintiff, the Commonwealth of Virginia. The Commonwealth has an independent claim to these damages, grounded in the traditional *parens patriae* authority of state sovereigns. It should also be noted that the Commonwealth's independent right to compensation for oil spills was upheld in *In re Complaint of Allied Towing Corp.*, 478 F. Supp. 398, 403 (E.D. Va. 1979), and is recognized in the Federal Water Pollution Control Act. 33 U.S.C. § 1321(f)(4)–(5). Since the United States has not incurred any expense or monetary loss in connection with the lost wildlife, we see no reason why the Justice Department would be obligated to seek these damages in lieu of the state plaintiff. If the damages are received and directed to a charity by the state plaintiff, § 484 would not be implicated.[12]

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[8] 31 U.S.C. § 725s contains a listing of numerous trust funds that Congress has recognized. The section provides that "all moneys accruing to these funds are hereby appropriated and shall be disbursed in compliance with the terms of the trust."

[9] *See, e.g.*, the trust funds found in *Emery*, 186 F.2d 900, and *Varney*, 147 F.2d 258.

[10] It should be noted that one year after the *Steuart* oil spill, the Federal Water Pollution Control Act was amended to permit the state or federal government to recover the cost of replacement or restoration of natural resources as a clean-up cost, and to permit the United States or a state government to sue on behalf of the public as trustee of the natural resources and to use sums recovered to rehabilitate the natural resources. 33 U.S.C. § 1321 (f)(4)–(5) (Supp. III 1979).

[11] The doctrine of constructive receipt also has been applied by federal agencies in defining prohibitions on the acceptance of gifts and honoraria by federal employees. *See, e.g.*, 11 C.F.R. § 110.12(b)(5), which defines "accepted" in the following way:

> "Accepted" means that there has been actual or constructive receipt of the honorarium and that the federal officeholder or employee exercises dominion or control over it and determines its subsequent use. However, an honorarium is not accepted if the federal officeholder or employee makes a suggestion that the honorarium be given instead to a charitable organization which is selected by the person paying the honorarium from a list of 5 or more charitable organizations provided by the officeholder or employee.

See also the Department of Justice regulation at 28 C.F.R. 45.735–12(e).

Larry A. Hammond
Deputy Assistant Attorney General
Office of Legal Counsel

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[12] Although we have concluded that the *Steuart* settlement as proposed is barred by § 484, we must note that the same procedure would be expressly authorized for subsequent oil spills by the amendments to the Federal Water Pollution Control Act, 33 U.S.C. § 1321(f)(4)–(5).

Authority of the Comptroller General to Appoint an Acting Comptroller General

The Comptroller General is authorized to designate an employee of the General Accounting Office to act as Comptroller General in his absence, even if the Office of Deputy Comptroller General is vacant.

Acting heads of agencies have powers that are commensurate with those of agency heads who have been confirmed by the Senate.

June 13, 1980

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, DEPARTMENT OF THE TREASURY

This responds to your inquiry whether the Comptroller General may designate an employee of the General Accounting Office (GAO) to act as Comptroller General during his absence.[1] In particular, you have asked whether a GAO employee may be designated to serve as Comptroller General for purposes of action taken by the Chrysler Corporation Loan Guarantee Board, of which the Comptroller General is a member.

The core issue here is whether the Comptroller General may designate an employee of the General Accounting Office to act as Comptroller General pursuant to 31 U.S.C. § 43a, which provides:

> The Comptroller General shall designate an employee of the General Accounting Office to act as Comptroller General *during the absence or incapacity of the Comptroller General and the Deputy Comptroller General, or during a vacancy in both of such offices.* (Emphasis added.)

It might be argued that the italicized language signals Congress' intent only to authorize the designation of an Acting Comptroller General in two situations: when both the Comptroller General and Deputy Comptroller General are absent or incapacitated, or when both offices are vacant. On this reading, the provision would not cover the present case, in which the Comptroller General is absent and the office of Deputy Comptroller General is vacant.

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[1] You have made this inquiry in your capacity as General Counsel to the Chrysler Corporation Loan Guarantee Board, established pursuant to Pub. L. No. 96-185, § 3, 93 Stat. 1324, 15 U.S.C. §§ 1861 *et seq.*

However, such a narrow interpretation ignores the well-established principle of statutory construction that literal interpretations of statutes are not to be favored at the expense of the statute's evident purpose and history. *See, e.g., Train* v. *Colorado Public Interest Research Group, Inc.*, 426 U.S. 1, 9–10 (1976); *United States* v. *Public Utilities Commission*, 345 U.S. 295, 315 (1953); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459 (1892). The evident aim of 31 U.S.C. § 43a is to provide a mechanism whereby an Acting Comptroller General may be designated when the Comptroller General and Deputy Comptroller General are unavailable to perform the Comptroller General's duties. This purpose is not served by distinguishing between situations in which the Comptroller General and Deputy Comptroller General are both either absent or incapacitated or in which both offices are vacant, on the one hand, and situations in which one of the officers is absent or incapacitated and the other office is vacant, on the other hand.

Furthermore, the legislative history confirms that Congress did not intend to so limit the provision's application. The provision—enacted as part of the Independent Offices Appropriation Act of 1945, June 27, 1944, ch. 286, Title I, 58 Stat. 371—was introduced as a floor amendment at the urging of the Comptroller General. *See* 90 Cong. Rec. 3069–70 (1944). The clearest statement of its purpose appears in the Comptroller General's letter proposing it, which states in pertinent part:

> The need for legislation of the character here proposed is apparent in the recent history of the General Accounting Office. During the period from July 1, 1936, to April 10, 1939, and for a considerable period in 1940, the office of Comptroller General was vacant. The then Assistant Comptroller General [now the Deputy Comptroller General [2]] acted as Comptroller General, pursuant to law, but there was no other officer specifically authorized by law so to act *in the event of his absence or incapacity or in the event he had resigned or retired or his term had ended. . . .* (Emphasis added.)[3]

The provision thus was designed specifically to cover a situation in which the office of the Comptroller General was vacant and it was feared that the Assistant (now Deputy) Comptroller General might become absent or incapacitated *or* that he might resign or retire. It was plainly not intended to be confined to situations in which both officers were either incapacitated or absent, or in which both offices were vacant.[4]

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[2] The Assistant Comptroller General was designated Deputy Comptroller General pursuant to Pub. L. No. 92-51, 85 Stat. 125, 143 (1971).

[3] 90 Cong. Rec. 3070 (1944).

[4] *See also* 90 Cong. Rec. 5171 (1944).

We therefore conclude that 31 U.S.C. § 43a authorizes the Comptroller General, in present circumstances, to designate an employee of the GAO to act as Comptroller General during his absence. It is established that acting heads of agencies have powers that are commensurate with those of agency heads who have been confirmed by the Senate. *See, e.g., Ryan* v. *United States,* 136 U.S. 68, 81 (1890); *Marsh* v. *Nichols, Shepard & Co.,* 128 U.S. 605, 615 (1888); *Shafer* v. *United States,* 229 F.2d 124, 129 (4th Cir. 1956); *Anderson* v. *P.W. Madsen Investment Co.,* 72 F.2d 768, 770–71 (10th Cir. 1934); *Aderhold* v. *Menefee,* 67 F.2d 345, 346 (5th Cir. 1933); *cf. Keyser* v. *Hitz,* 133 U.S. 138, 145–46 (1890). There is no indication in the language of the Chrysler Corporation Loan Guarantee Act of 1979, Pub. L. No. 96–185, 93 Stat. 1324, 15 U.S.C. § 1861 *et seq.* (1980), that Congress intended to create an exception to this fundamental precept in the context of the Chrysler Corporation Loan Guarantee Board.[5] Accordingly, we believe that the Acting Comptroller General is legally authorized to serve as Comptroller General in the context of actions taken by that Board during the Comptroller General's absence.[6]

Larry A. Hammond
Deputy Assistant Attorney General
Office of Legal Counsel

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[5] Section 3 of the Act establishes the Chrysler Corporation Loan Guarantee Board, "which shall consist of the Secretary of the Treasury who shall be the Chairperson of the Board, the Chairman of the Board of Governors of the Federal Reserve System, and the Comptroller General of the United States." 15 U.S.C. § 1862. This provision contains no limiting language indicating, for instance, that the Comptroller General or other Board members must personally appear at Board meetings. No other section of the Act would appear to impose any such requirement.

Nor are we aware of any such indication in the legislative history. The provision establishing a three-member Chrysler Corporation Loan Guarantee Board originated in the Senate bill, S. 2094, and its purpose is thus described in the Report of the Senate Committee on Banking, Housing, and Urban Affairs, 96th Cong., 1st Sess. 17 (1979):

> The Administration bill would have had the Secretary of the Treasury be the sole administrator of the loan guarantees for Chrysler. The Committee believes that a three-person board offers more balance and that the addition of two members who are independent of the Executive, the Federal Reserve Board Chairman and the Comptroller General, will enable the Board to make tough decisions on the merits of the issues without undue pressure from political considerations.

The aim of providing for a three-person Board in order to establish balance and independence would not be undercut by the participation, pursuant to lawful designation, of an Acting Comptroller General rather than the Comptroller General during the latter's absence. *See also* H.R. Rep. No. 96-730, 96th Cong., 1st Sess. 17 (1979) (confirming that the conference adopted the Senate provision regarding membership of the board).

[6] We have confirmed that our conclusion is consistent with the practice and views of the General Accounting Office.

Providing Representation for Federal Employees Under Investigation by Their Inspector General

Neither the Department of Justice nor any other federal agency has authority to provide legal representation to a federal employee in disciplinary proceedings instituted by his own agency. Authority to provide counsel to a federal employee may be implied only where the employee's official conduct has been attacked by a nongovernmental plaintiff or a state prosecutive office, and not by an agency of the government itself.

An Inspector General's Office is an integral part of the agency in which it is located, and its investigation of an agency employee is thus analogous to an investigation of Department of Justice employees by the Criminal Division of the Department of Justice.

June 18, 1980

MEMORANDUM OPINION FOR THE CHIEF COUNSEL, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

This is in response to your request for our views on the authority of the National Highway Traffic Safety Administration (NHTSA) to provide outside legal counsel to assist certain of its employees who are being investigated by the Office of Inspector General of the Department of Transportation for possible criminal conduct. We understand that the investigation stems from allegations made by a former employee of your agency. You state that it appears to NHTSA that its employees were carrying out official policy through activity within the scope of their assigned duties and that, in your view, the employees who are the objects of the Inspector General's investigation were engaged in the performance of an agency function during the period in question.

Although, as you indicated, this Department's guidelines for its provision of legal representation to federal employees, 28 C.F.R. §§ 50.15 and 50.16, do not cover the NHTSA personnel under investigation, it will nevertheless be helpful to note the basis of those guidelines.

Section 50.15 is grounded on this Department's position that under the authority of 28 U.S.C. §§ 516–517 and 28 U.S.C. § 509 it may in general either (1) assign lawyers on its staff to represent a federal employee in legal proceedings in which a civil claim or a criminal charge by a state governmental unit is being asserted against him for allegedly wrongful conduct in the discharge of his duties,[1] or (2) pay for private counsel for an employee when a conflict of interest makes it impossible for the Department to represent him. Legal assistance of either kind is deemed to be in the interest of the United States within the meaning of 28 U.S.C. § 517 because establishing the lawfulness of authorized conduct on its behalf is important to the government and making legal assistance available to employees tends to prevent their being deterred from the vigorous performance of their tasks by the threat of litigation.

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[1] 28 C.F.R. § 50.15 also authorizes this Department to provide legal representation for a federal employee in congressional proceedings.

Turning to your letter, we read it as concluding that it would be in the interest of the United States for NHTSA to provide legal counsel from its own ranks for the benefit of the employees being investigated. You point out, however, that your staff lawyers would necessarily encounter conflicts of interest in serving the employees, and you therefore propose that the Department of Transportation and NHTSA pay for outside counsel to assist them. Thus, there is to some extent a parallel between your proposal and action taken by this Department under 28 C.F.R. § 50.15. However, there is a divergence between the two, which leads us to the conclusion that our practice under that regulation does not lend support to your position here.

When § 50.15 comes into play, the impetus for the adverse action against the federal employee has come from outside his department or agency—that is, from a nongovernmental plaintiff in a civil suit or from a state prosecutive office. We are not aware of any authority of this Department under its own governing statutes or other laws that would permit it to provide legal representation to a federal employee in disciplinary proceedings instituted by his own department or agency, or, for that matter, in any investigation by his department or agency to determine whether such proceedings, or possibly criminal proceedings, should be instituted. Similarly, we are not aware of any legal authority for a governmental entity itself to furnish such assistance to one of its own employees in those circumstances. The interest of the United States in such cases is in ensuring that its employees adhere to the statutory and administrative standards of conduct laid down for their observance. It is one thing for a governmental organization to aid an employee under outside legal attack for actions taken in his official role, and another for the organization to aid an employee whom for its own part it may suspect of wrongful conduct.

At bottom, the question of representation is one that depends upon whether there exists a fair basis for concluding that Congress has granted to your agency the authority to provide counsel to employees who become subject to the type of administrative investigations initiated by your Inspector General. Nothing in the Act establishing the Office of Inspector General for the Department of Transportation grants that authority, and the only authority you have cited in the legislation generally governing the Department of Transportation is the general housekeeping provision that empowers the hiring of contractors. *See* 5 U.S.C. § 3109; 49 U.S.C. § 1657. The contracting statutes do not, however, provide the substantive authority you seek; in general, they only provide a method of procedure for carrying into effect powers elsewhere granted. In the absence of explicit authority, this Department has adhered to the principle—also reflected in recent Comptroller General opinions—that authority to retain counsel may be implied where the employee's official conduct has been attacked and prosecuted by an individual outside the agency.

This distinction is exemplified in a recent Comptroller General opinion, Comp. Gen. Op. B-193536, June 18, 1979, which ruled that an agency could not properly reimburse an employee for legal fees paid in defending himself in agency proceedings against him on charges of misconduct which, although initially raised by an outside party, were not pursued by the latter but by the agency itself on the basis of its independent determination to investigate the employee's conduct. The opinion distinguished that situation from the one in an earlier opinion, Comp. Gen. Op. B-127945, April 5, 1979, involving a hearing, required by an agency's regulations, of charges of misconduct by two of its employees in the performance of their official duties where the charges were initiated and pursued in the prescribed administrative forum by a private party. The Comptroller General concluded in B-127945 that the agency could properly expend its appropriations for the provision of private legal services to the employees, absent the possibility of representation provided by the Attorney General or its own legal staff. The later opinion, B-193536, *supra,* noted specifically that in B-127945 and other cases in which the Comptroller General had approved such expenditures, "the conduct of the Federal employees was brought into issue and pursued by a third party and not by the Government itself." B-193536, p. 6.

We have considered your suggestion that an investigation by your department's Office of Inspector General seems more analagous to the case of an outside party challenging the actions of an agency employee, than to an internal agency proceeding where the interests of the agency and its employee conflict. It is true that an Inspector General appointed and serving under the Inspector General Act of 1978 is largely free of control by the head of his department or agency in relation to his investigative functions. Nevertheless, he is an integral part of his department or agency, is selected by and serves at the pleasure of the President, and performs duties that are carried out in lesser degree in all sizable organizations of the federal government. We have been unable to find, either in the statutory structure of Inspector General offices or in the legislative history of that Act, evidence of the unique status you have suggested. Because we cannot equate the position of the Inspector General in the current investigation of NHTSA employees to that of an outside party making charges against them, we are of the opinion that neither your department nor NHTSA may retain and compensate private lawyers to serve the employees being investigated by the Inspector General.

This investigation of NHTSA employees by the Department of Transportation's Inspector General is analogous, in our view, to an investigation of Department of Justice employees by the Criminal Division of the Department of Justice. Although the Department can sometimes provide representation for Justice employees who are defendants in civil cases or state criminal proceedings, as a general rule it has authority to provide such representation only after it has determined institutionally that the employees are being asked to answer for legally defensible conduct in the course and scope of their federal duties and that a defense of their conduct on the merits will therefore be tantamount to a defense of the United States itself, a legal entity that can act only through its agents. But when the Criminal Division initiates a criminal investigation of one of our own employees, the Department cannot have made that determination. The very purpose of the investigation is to make it—to decide what a defense of the interests of the United States requires, be it prosecution, exoneration, or something in between; and it is for that reason that the Department cannot provide a defense of *personal* interests in the investigation itself.[2]

John M. Harmon
Assistant Attorney General
Office of Legal Counsel

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[2] In unusual situations this Department may, during the pendency of a criminal investigation, provide representation for government employees, including Department of Justice employees, who are defendants in civil actions brought by persons outside the government. In these situations it is possible for the Department to determine that it will be in the interests of the United States to provide a provisional defense for the employees (and hence the United States) until the results of the criminal investigation are known. But this determination does not permit the Department to provide the employees with representation (either directly or through private counsel) for the purpose of defending their personal interests against the government itself in the criminal investigation. From the standpoint of defending the interests of the United States, such a defense is either unauthorized or premature. The same conclusion must be reached with respect to the investigative activities of an Inspector General.

Constitutionality of Legislation Establishing the Cost Accounting Standards Board

If the Cost Accounting Standards Board (CASB) is viewed as an Executive Branch entity, the statutory mechanism for appointing its members is unconstitutional under the Appointments Clause; however, it can be argued that the CASB is a Legislative Branch entity, and that its action in promulgating cost accounting standards is advisory with respect to executive agencies.

The Department of Justice has a duty to defend the constitutionality of a statute except in exceptional circumstances, and it thus may be appropriate to bring to a court's attention any plausible argument that would permit the court to uphold a statute.

June 19, 1980

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CIVIL DIVISION

This responds to your memorandum informing us of the position your Division plans to take in pending litigation regarding the constitutionality of the statute establishing the Cost Accounting Standards Board (CASB), Pub. L. No. 91-379, Title I, 84 Stat. 796, 50 U.S.C. App. § 2151 *et seq.* Since receiving your memorandum, we have kept in touch with the staff attorney in your Division handling the matter, and have learned that the constitutional issue has not yet been briefed. We believe that the position elaborated in your memorandum is persuasive. We essentially agree with your analysis that, insofar as the CASB is viewed as an Executive Branch entity whose members are to be appointed pursuant to the Appointments Clause of the Constitution, Art. II, § 2, cl. 2, the statute establishing the CASB is unconstitutional because the mechanism it creates for appointing members is not in conformity with that clause.[1]

Although you have not formally asked for our opinion on the constitutional issue, because of its importance we wish to take this opportunity to comment. We think that an additional, plausible argument could be made that would permit a court to uphold the statute. Given the Department's duty to defend the constitutionality of statutes except in exceptional circumstances, it may well be appropriate to bring this argument to the court's attention.

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[1] The CASB comprises the Comptroller General and four others appointed by him. Although the Comptroller General—who is appointed by the President by and with the advice and consent of the Senate, *see* 31 U.S.C. § 42—is appointed in conformity with the Appointments Clause, the other four members are not. For the Comptroller General is properly viewed as a Legislative Branch official, and thus not as "head" of a "Department" for purposes of the Appointments Clause. *See Buckley* v. *Valeo,* 424 U.S. 1, 127 (1976); 31 U.S.C. § 43, 53, 65(d); Reorganization Act of 1949, 63 Stat. 205; Reorganization Act of 1945, 59 Stat. 616; Corwin, *Tenure of Office and the Removal Power,* 27 Colum. L. Rev. 353, 396 (1927); W. Willoughby, The Legal Status and Functions of the General Accounting Office of the National Government 12-16 (1927); *cf.* H. Mansfield, The Comptroller General 74-92 (1939).

At bottom, your analysis would appear to presume that the statute establishing the CASB and providing that its cost accounting standards "shall be used" by executive agencies creates an entity with the power to issue binding standards that must be followed by the Executive Branch. *See* 50 U.S.C. App. § 2168(g). This interpretation apparently accords with the relevant administrative practice, and is consistent with the facts of this case. However, it can be argued that the CASB is really a Legislative Branch entity, and that its action in promulgating cost accounting standards is appropriate to such an entity since it is, in the final analysis, advisory with respect to executive agencies. This approach, of course, avoids the Appointments Clause question.

The view that the CASB is a Legislative Branch entity rests on the statute establishing it as "an agent of the Congress," which is to be "independent of the executive departments. . . ." 50 U.S.C. App. § 2168(a). The description of the CASB as an "agent of the Congress" recurs in the legislative history, *see* S. Rep. No. 91-890, *reprinted* 1970 *U.S. Code Cong. & Admin. News* 3768, 3772. Congress cannot constitutionally delegate to a Legislative Branch entity the authority to impose binding substantive regulations on the Executive Branch, for that would violate basic separation of powers principles, as this Department has often noted in the context of so-called "legislative veto" devices. *See, e.g.,* Letter from Assistant Attorney General Parker to Chairman Ribicoff on S. 1945, April 21, 1980; opinion of the Attorney General to the Secretary of Education, June 5, 1980.*

On the other hand, a Legislative Branch entity can take action in aid of the legislative functions of Congress, such as gathering information or investigating executive agencies. *See Buckley* v. *Valeo, supra,* 424 U.S. at 137-38. It could be argued here that, insofar as the cost accounting standards are advisory, their promulgation is justified as in aid of Congress' oversight of government contracts, for it seems clear that Congress is served by receiving uniform information about the cost accounting practices of government contractors. Although the statute provides that the CASB's standards "shall be used" by government agencies and contractors, it could be suggested that this language does not unequivocally purport to bind executive agencies. First, it is an accepted canon of statutory construction that courts will seek, if at all possible, to construe a statute to avoid a serious question of its constitu-

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*NOTE: The text of the Attorney General's opinion of June 5, 1980, appears in this volume at p. 21. *supra.* Ed.

tionality.[2] Second, in this case, a court might construe the direction that the CASB's standards "shall be used" by executive agencies not to require that agencies follow such standards absolutely, but merely to require them to "use" the standards, which could include deciding whether to follow them in a given case.

This interpretation draws support from the ordinary meaning of the verb "to use," which indicates "any putting to service of a thing, usu[ally] for an intended or fit purpose . . .", Webster's Third New International Dictionary 2524 (1976), or employing a thing "for a certain end or purpose." *First Federal Savings & Loan Ass'n* v. *Williams*, 91 N.E. 2d 34, 36 (C.A. Ohio 1947); *See Yandle* v. *Hardware Mutual Ins. Co.*, 314 F.2d 435, 437 (9th Cir. 1963). The meaning of the verb must be ascertained with reasonable regard for the context in which it is employed. *See McJimsey* v. *City of Des Moines*, 2 N.W. 2d 65, 68 (Iowa 1942); *In re Holmes' Estate*, 289 N.W. 638, 640 (Wis. 1940). It would stretch the ordinary meaning of "to use" to say that, standing alone, it means that in every situation regardless of the fitness of a thing to a given case, the thing *must* be employed.

Accordingly, in the present context, it is possible to argue that the phrase "shall be used" should be construed to permit agencies, while being generally guided by the CASB's cost accounting standards, not to follow given standards when the agency considers that they would impinge on the Executive Branch's responsibility to execute the laws and thus would not be "fit" for a particular case. In particular, in putting the CASB's standards into service "for a fit purpose," an agency might choose not to follow a standard if it infringes on the agency's responsibility of negotiating or administering public contracts.

This reading of the statutory language would appear to be consistent with the Department's view of it when it was in the form of an enrolled bill. In a memorandum to the Director of the Office of Management and Budget, the Deputy Attorney General suggested that the creation of the CASB apart from the Executive Branch might be justified on the ground that the Legislative Branch, in performing its normal oversight functions, may reasonably expect, and certainly would be assisted by, consistency and uniformity in the information it receives about public contracts, such as would be fostered by adherence to cost accounting standards. Viewing the statutory language on its face, the Deputy Attorney General was unable to conclude that it would inevitably lead to conflicts of constitutional proportion between the CASB and the Executive Branch, for that ". . . would depend on the substance of the standards and regulations adopted by the Board." Although the Deputy Attorney General feared that, as applied, the statute might eventually generate disputes between the Congress, with its interest in receiving information about public contracts, and the Executive Branch, with its interest in managing the negotiation and administration of public contracts, the Deputy's memorandum apparently took for granted that the statute *could* be given a facially constitutional reading.

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[2] *See, e.g., United States* v. *Rumeley*, 345 U.S. 41, 45 (1953); *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); *Missouri Pacific R.R. Co.* v. *Boone*, 270 U.S. 466, 471–72 (1926); *United States* v. *Delaware & Hudson Co.*, 213 U.S. 366, 407–08 (1909); *see also Ashwander* v. *TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

In sum, we are in substantial agreement with the analysis of your memorandum. But we offer for your consideration the further argument outlined above which, if accepted by the court, could prevent the statute from being held to be unconstitutional.

Leon Ulman
Deputy Assistant Attorney General
Office of Legal Counsel

Attorney General's Authority to Reprogram Funds for the United States Marshals Service to Avoid Deficiencies

The Attorney General has authority to reallocate funds among programs of the United States Marshals Service and to make available to the Service funds presently allocated to other programs and activities funded through the same lump sum appropriation.

An agency head's discretion to reprogram appropriated funds within a lump sum appropriation account in an antideficiency situation would be limited only if a specific statutory directive required the expenditure or distribution of funds in a particular manner.

June 20, 1980

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

This memorandum responds to your request for our analysis of the Attorney General's authority to allocate funds for the United States Marshals Service (USMS) in order to avoid a deficiency in USMS appropriations prior to the end of fiscal year 1980. We conclude that, in order to achieve compliance with the Antideficiency Act (the Act), 31 U.S.C. § 665, the Attorney General has authority to reprogram funds among programs within the USMS, and to make available to the USMS funds presently allocated to other programs and activities funded through the same lump sum appropriation.

Like all federal agencies, the Department of Justice, including the USMS, is subject to the requirements of the Antideficiency Act. Among other things, the Act requires that funds appropriated to an agency for a definite period of time

> be so apportioned as to prevent obligation or expenditure [of the appropriation] in a manner which would indicate a necessity for deficiency or supplemental appropriations for such period . . .

§ 665(c)(1). Such an apportionment, in effect, is a scheduling of anticipated obligations or expenditures to assure that an agency will not run out of funds prior to the end of the period for which funds have been appropriated. The Office of Management and Budget (OMB), under

§ 665(d), apportions Department of Justice funds on a quarterly basis.[1] It would be unlawful for any officer or employee of the Department to authorize or create obligations or make expenditures in excess of any OMB apportionment. § 665(h).

In order to help ensure that the USMS will not encounter deficiency spending in the fourth quarter of this fiscal year, and thus to achieve compliance with the Antideficiency Act, the USMS, on May 30, 1980, submitted a plan to you for reduced USMS spending and a redistribution of anticipated spending among the USMS's various functions. This plan raises the question whether the Attorney General may reprogram funds among various USMS functions in order to fulfill the purposes of the Antideficiency Act.

The existence of such general reprogramming authority is clear. Congress implicitly recognized such authority in § 8 of the Department of Justice Appropriation Authorization Act for Fiscal Year 1980, Pub. L. No. 96-132, 93 Stat. 1040, 1046 (1979), which requires the Attorney General to report to Congress concerning the circumstances of certain reprogrammings.[2]

It is also the rule that such reprogramming authority extends to the expenditure of funds under lump sum appropriations. The Comptroller General has taken the position that a lump sum appropriation may be used for any authorized purpose, even if the legislative history of the appropriation statute prescribes specific priorities with regard to allocating funds among authorized purposes. *See e.g., Newport News Shipbuilding and Dry Dock Co.*, 55 Comp. Gen. 812, 819-21 (1976); *LTV Aerospace Corp.*, 55 Comp. Gen. 307, 318-19 (1975). We have recently examined this issue in a related context and have reached the same conclusion.[3] By the same token, the absence in the terms of an appropriations act of a prohibition against certain expenditures under that appropriation implies that Congress did not intend to impose restraints upon an agency's flexibility in shifting funds among activities or functions within a particular lump sum account.[4] Funds for the USMS for

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[1] Under limited circumstances, *e.g.*, when laws requiring expenditures have been enacted subsequent to the transmittal to Congress of an agency budget estimate, the Antideficiency Act permits apportionments to be made that anticipate the need for supplemental appropriations. 31 U.S.C. § 665(e).

[2] Under this section each organizational component of the Department is required to give 15 days' notice to specified congressional committees of any decision to "reprogram" funds in excess of a certain amount. Notification must be given whenever funds are shifted from one "program" to another, as that term is defined in the Department's budget submission to Congress.

[3] *See* Memorandum Opinion of June 5, 1980, to the Deputy Attorney General, "Use of Law Enforcement Assistance Administration Program Grant Funds for Administrative Purposes" [p. 674 *supra*].

[4] *See* Fisher, *Reprogramming of Funds by the Defense Department*, 36 The Journal of Politics 77, 78 (1974):

> The [congressional] committees and the agencies recognize that it is often necessary and desirable to depart from budget justifications. The Department of Defense must estimate months and sometimes years in advance of the actual obligation and expenditure of funds. As the budget year unfolds, new and better applications of money come to light. Reprogrammings are made for a number of reasons, including unforeseen

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the current fiscal year were appropriated as part of a lump sum account covering expenses of United States Attorneys, the USMS, and the United States Trustees. *See* Pub. L. No. 96–68, 93 Stat. 416, 420 (1979). Nothing in the terms of the Department's 1980 Appropriations Act suggests that funds must be allocated among the three programs funded by that account in any particular manner.

We believe that, as a general matter, the agency head's discretion to reprogram appropriated funds within or among programs in a lump sum account in an antideficiency situation would be limited only if a specific statutory directive required the expenditure or distribution of funds in a particular manner. In *City of Los Angeles* v. *Adams,* 556 F.2d 40, 49–50 (D.C. Cir. 1977), the D.C. Circuit affirmed this proposition:

> If Congress does not appropriate enough money to meet the needs of a class of beneficiaries prescribed by Congress, and if Congress is silent on how to handle this predicament, the law sensibly allows the administering agency to establish reasonable priorities and classifications.

In an analogous situation, the Supreme Court, in *Morton* v. *Ruiz,* 415 U.S. 199, 230–31 (1974), recognized an agency head's "power to create reasonable classifications and eligibility requirements in order to allocate the limited funds available to him." Limitations on this discretion might take the form of a line-item appropriation specifically required to be expended in full during the fiscal year for one particular activity and no other. Or they might take the form of a provision in an authorizing statute specifying a particular manner of apportionment, or indicating congressional intent to continue one particular activity at the expense of others in an antideficiency situation.[5]

We have examined the statutes that prescribe the authority and duties of the USMS and are satisfied that they place no limitation on the Attorney General's discretion to reprogram funds for USMS activities in such a way as will ensure both compliance with the Antideficiency Act and the most efficient and effective performance of the USMS's

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> developments, changing requirements, incorrect price estimates, wage-rate adjustments, changes in the international situation, and legislation enacted subsequent to appropriations.

It is significant that Congress has explicitly recognized this flexibility in the executive branch. *See e.g.*, H.R. Rep. No. 662, 93d Cong., 1st Sess. 16 (1973); H.R. Rep. No. 1607, 87th Cong., 2d Sess. 21 (1962); H.R. Rep. No. 408, 86th Cong., 1st Sess. 20 (1959).

[5] For example, in *City of Los Angeles* v. *Adams, supra,* the court held that congressional curtailment of funding in an appropriations statute did not justify the Federal Aviation Administration's departure from statutory provisions requiring funds to be apportioned in a specific manner. *Compare Scholder* v. *United States,* 428 F. 2d 1123 (9th Cir. 1970), *cert. denied,* 400 U.S. 942 (1970) where the court rejected a claim that the Bureau of Indian Affairs' expenditure of appropriated funds on an Indian irrigation project, part of which would benefit solely non-Indians, was unauthorized. In doing so, it stated that "if Congress had wanted to impose on the Bureau the restrictions urged by appellants, it could have done so easily." 428 F. 2d at 1129.

overall mission when a deficiency is threatened.[6] In the absence of statutory restrictions, the Attorney General has the discretion to determine how projected deficiencies in total appropriations available for the fiscal year shall be distributed among the various functions the USMS is authorized to perform.[7]

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

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[6] Section 569 of Title 28, United States Code, describes generally the powers and duties of the United States marshals. Subsection (c) provides that the Attorney General "shall supervise and direct United States marshals in the performance of public duties and accounting for public moneys." Subsection (a) states that the United States marshal of each district "may, in the discretion of the [district court] be required to attend any session of court." So far as we can determine from the legislative history of these two provisions, subsection (a) was not intended to operate as a limit on the supervisory authority given the Attorney General in subsection (c). We believe that the most reasonable explanation of the discretion given the courts under subsection (a) is that it was intended to permit them to relieve the marshal of his responsibility to attend every session, rather than give the courts some independent authority to supervise and direct the marshal which would overlap that of the Attorney General in § (c).

We are aware of no provision in any other statute which limits the Attorney General's discretion to supervise and direct the marshals in carrying out their responsibilities under law.

[7] Even a decision to discontinue entirely one of several authorized functions funded by a lump sum account because of a shortfall in appropriations would, we believe, be within the Attorney General's discretion. *Cf.* Comptroller General Decision B-115398 at 12, June 23, 1977 ("Neither the Comptroller General nor the courts are authorized under the [Impoundment Control] Act to constrain the Executive branch in the way the funds are to be used once released").

Proposed Presidential Proclamation Entitled "Registration Under the Military Selective Service Act"

[The following memorandum was prepared by the Office of Legal Counsel pursuant to its responsibility under Executive Order No. 11,030 for approving all executive orders and presidential proclamations for form and legality. On the constitutional issue raised by the proposed proclamation, it notes the conclusion reached in an earlier opinion of the Office that a male-only draft is constitutional. On the statutory question, it concludes that the President is authorized under the Selective Service Act to require the registration, by age group, of some but not all males between the ages of 18 and 26.]

June 30, 1980

MEMORANDUM

The attached proposed proclamation was submitted informally to the Office of Management and Budget by the Selective Service System. It was revised in the Office of Management and Budget and has been forwarded for consideration of this Department as to form and legality by that Office with the approval of the Director. Suggestions made by this Office were incorporated during the drafting process.

The proposed proclamation would invoke the President's power under § 3 of the Military Selective Service Act, as amended [the Act], 50 U.S.C. App. § 453, to require male citizens of the United States and other male persons residing in the United States between the ages of 18 and 26 and not exempt under the Act to register with the Selective Service System. It would end the hiatus in registration caused by President Ford's Proclamation No. 4360 of March 29, 1975 ("Terminating Registration Procedures Under the Military Selective Service Act, as Amended").

The proclamation would require the registration of all nonexempt males who were born on or after January 1, 1960 and have reached the age of 18. No other persons would be required to register. This designation of the persons required to register raises constitutional and statutory issues.

The constitutional question is whether requiring men but not women to register constitutes impermissible discrimination based on sex. This Office has previously addressed that issue and has concluded that a male-only registration is constitutional. Memorandum from Assistant Attorney General Harmon to Deputy Director White, Office of Management and Budget, "Constitutionality of All-Male Draft Registration," January 31, 1980.[*]

The statutory question involves the President's power to require the registration, by age group, of some but not all males between the ages of 18 and 26. An argument can be made that the President's power is limited to requiring the registration of the entire group; that he may not, as the proclamation would, limit registration to 18, 19, and 20 year olds.

Section 3 of the Act provides in pertinent part that

> it shall be the duty of *every* male . . . who, on the day or days fixed for the first or any subsequent registration, is between the ages of 18 and 26, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

50 U.S.C. App. § 453 (emphasis added). This language, on its face, can be read as evincing a congressional intent that all persons within the age group delineated be registered. Moreover the phrase "at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President" does not, in terms, give the President discretion to exclude groups in the 18-to-26 range from the duty imposed on *every* male in that range.

The legislative history of § 3 reveals that

> The Senate bill provided for the registration of male persons between the ages of 18 and 26, and contained no specific provision authorizing registration by age groups. The House amendment provided for the registration of male persons between the ages of 18 and 31, and specifically authorized the President to provide for registration by age groups.

H. Conf. Rep. No. 2438, 80th Cong., 2d Sess. 44 (1948). The conference adopted the Senate version, the version devoid of specific authority for the President to provide for registration by age groups. *Id.* This was in contradistinction to the course that Congress had taken in the predecessor to § 3, the model for the House version. The predecessor contained the specific authority, in the exact language omitted from § 3 in 1948. *Compare* § 2 of the Selective Training and Service Act of 1940, 54 Stat. 885, *with* § 3 of H.R. 6401, 80th Cong., 2d Sess. (1948), at 94 Cong. Rec. 8395 (1948).[1]

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[*] NOTE: In *Rostker* v. *Goldberg*, 453 U.S. 57 (1981), the Supreme Court upheld the constitutionality of male-only draft registration. Ed.

[1] Although the Selective Training and Service Act of 1940 contained the specific authority for registration by age groups, a contemporaneous interpretation by the Attorney General concluded that

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In light of the language of § 3 and its legislative history, this Office orally advised the Office of Management and Budget earlier this year that it would be highly desirable to have some congressional action confirming his authority before the President issued a proclamation calling for the registration of persons by age groups consisting of less than the entire 18-to-26 range. Since we provided that advice, Congress, at the request of the President, and fully informed of the President's plan to register, by age group, less than the entire range has, after lengthy and considered debate, appropriated for this registration funds sufficient only to register the number of males in the age groups named in the proclamation. We believe that this congressional action is sufficient to confirm the President's authority.

The proclamation would require persons born in 1960 to register during a six day period beginning July 21, 1980. Those born in 1961 would register between July 28, 1980 and August 2, 1980, and those born in 1962 between January 5, 1981 and January 10, 1981. The proclamation would also establish a continuous registration process, obligating persons to register as they turn 18, upon losing an exempt status, and, with respect to noncitizens, either as they return to residence in the United States from abroad or as they enter to reside. Aliens in processing centers on the days fixed for their registration would be required to register after their release. A range of days to register would be provided those subject to the continuous registration program. Provision would be made for the late registration of those unable to register at the proper time due to some condition beyond their control, such as hospitalization or incarceration.

Registration in the United States would be at any United States Post Office. Registration overseas—available to citizens only—would be before a consular officer of the United States or other designated

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the President was nonetheless required to register, within a reasonable time, all persons within the 21-to-36 range set in that Act by Congress. Regarding the first registration proclamation under the 1940 act, the Attorney General wrote the President:

> It will be noted that on page 3 of the draft, in paragraph numbered 2, the higher age limit of those to be registered on the sixteenth day of October is left blank. This was done out of deference to the wishes of the War Department who I understand will urge that such age limit for the first draft be the thirty-first anniversary of the day of birth.
>
> The language of the act is ambiguous and I am not prepared to say that you may not require registration of persons of *different* age groups on different registration days. The statute as a whole, however, definitely contemplates that all persons between the ages of twenty-one and thirty-six shall be registered, and under the constitutional requirement that the President shall take care that the laws are faithfully executed, it is, in my opinion, your duty to see that this is done within a reasonable time. If, therefore, the age limit inserted in the blank above indicated is other than "thirty-sixth" you should, within a reasonable time, set another registration date or other registration dates for the purpose of the registration of all persons falling within the age limits prescribed in the statute. What is a reasonable time for such purposes depends, of course, upon the exigencies under existing conditions.

Letter to the President from the Attorney General, of September 16, 1940. (The decision made was to register the entire group. *See* Proclamation No. 2425 of September 16, 1940 ("Registration Day"), 3 C.F.R. at 185 (1938-43 Comp.).)

person at any United States Embassy or Consulate. Hours for registration in the United States would be the business hours of the Post Offices. Hours for registration overseas would be set by the Department of State. In utilizing the Post Office and the Department of State to assist the Selective Service in registering persons, the President would be exercising his authority under § 10(b)(5) of the Act, 50 U.S.C. App. § 460(b)(5), "to utilize the services of any or all departments and any and all officers or agents of the United States . . . in the execution of this title [§§ 451 through 471a, 50 U.S.C. App.]."

The proclamation would direct persons required to register to comply with the registration procedures and other rules and regulations prescribed by the Director of Selective Service, to identify themselves when reporting for registration, and to keep the Selective Service System informed of their current addresses after registration. It would urge everyone to cooperate with and to assist those required to register. Executive agencies would be required, upon request of the Director, to assist, to the extent permitted by law, the Selective Service System in carrying out the purposes of the proclamation.

This Office has been informed by the Office of the Counsel to the President that that Office intends to have a reference to the congressional resolution making the funds for this registration available inserted in the proclamation's preamble. No such reference is contained in the proposed proclamation as transmitted to this Department by the Office of Management and Budget. Its inclusion will not affect the legality of the proclamation.

The proposed proclamation is acceptable as to form and legality.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

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Establishment of a Labor Relations System for Employees of the Federal Labor Relations Authority

Neither Executive Order No. 11,491 nor Title VII of the Civil Service Reform Act of 1978, nor any other law, precludes the Federal Labor Relations Authority and other offices administering Federal labor-management relations law from establishing a collective bargaining system for their employees.

The FLRA does not need specific statutory authority in order to bargain with its employees, in light of the general federal policy favoring bargaining by public employees.

Any labor relations system established by the FLRA must comply with Title VII and other relevant federal laws and executive orders.

In the absence of specific statutory authorization, a labor relations system established in the federal sector may not provide for binding arbitration by an outside third party, because federal officials may not delegate to a private party decisionmaking authority vested in them by Congress; however, advisory arbitration would be legally permissible.

July 1, 1980

MEMORANDUM OPINION FOR THE EXECUTIVE DIRECTOR, FEDERAL LABOR RELATIONS AUTHORITY

This responds to your request for our opinion regarding the legality of establishment by the Federal Labor Relations Authority (FLRA) of a labor relations system for its employees. Specifically, you have asked (1) whether the FLRA [1] lawfully may establish for its own employees a labor relations system, including, for example, provisions for exclusive recognition of an employee representative, bargaining agreements, unfair labor practices, and negotiated grievance procedures; and (2) whether such a system lawfully could provide for the use of binding or advisory arbitration by an outside third party for the resolution of disputes arising thereunder. According to your opinion request, you have concluded that you lawfully may establish a labor relations system for FLRA employees, but that, absent a statute or executive order, provision for binding arbitration is not legal. We concur in these conclusions. In our opinion, you lawfully may establish a labor relations system for FLRA employees so long as the system does not violate any of the prohibitions in the federal service labor-management relations statute, 5 U.S.C. § 7101 *et seq.*, or delegate to a third party any final decisionmaking authority.

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[1] Your opinion request extends also to the Federal Service Impasses Panel, as well as the General Counsel of the FLRA. The Federal Service Impasses Panel provides assistance in resolving negotiation impasses between agencies and employee representatives. 5 U.S.C. § 7119. The General Counsel of the FLRA investigates unfair labor practices, prosecutes complaints, and exercises such other powers as the FLRA may prescribe. 5 U.S.C. § 7104(f). Further references in this memorandum to the FLRA also encompass the Impasses Panel and the General Counsel, unless otherwise indicated.

Because you may not lawfully delegate to a third party the responsibility given you by Congress, you may not enter into an agreement to submit to binding arbitration. If the FLRA believes that advisory arbitration would be useful, such advisory arbitration is a lawful mechanism for the resolution of disputes.

I.

The FLRA was first created by Reorganization Plan No. 2 of 1978, 43 Fed. Reg. 36,037, as an independent establishment in the executive branch to manage the labor relations system for that branch. It assumed responsibility for certain functions previously performed under Executive Order No. 11,491, as amended,[2] by the Federal Labor Relations Council, the Civil Service Commission, and the Assistant Secretary of Labor for Labor Management Relations. To determine which employees were covered by Reorganization Plan No. 2, and thus within the jurisdiction of the FLRA, it was necessary to refer to Executive Order No. 11,491.[3] No mention of a labor relations system for FLRA employees was made in the Reorganization Plan.

Executive Order No. 11,491, promulgated in 1969, declares in § 1 that each employee of the executive branch "has the right, freely and without fear of penalty or reprisal, to form, join and assist a labor organization or to refrain from any such activity, and each employee shall be protected in the exercise of this right." In § 11, the order provides that an agency and a labor organization that has been accorded exclusive recognition shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions. Negotiated procedures could provide for arbitration of grievances, but either party could file exceptions to an arbitrator's award with the Council (now FLRA), a public body.

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[2] Subsequent references in this memorandum to Executive Order No. 11,491 refer to that order as amended, unless otherwise indicated.

[3] This reference to Executive Order No. 11,491 is necessary because Reorganization Plan No. 2 simply transferred certain functions previously performed under that order to the FLRA. Section 304 of the plan provided:

> Subject to the provisions of Section 306, the following functions are hereby transferred:
>
> (a) To the Authority—
>
> (1) The functions of the Federal Labor Relations Council pursuant to Executive Order 11,491, as amended;
>
> (2) The functions of the Civil Service Commission under Section 4(a) and 6(e) of Executive Order 11,491, as amended;
>
> (3) The functions of the Assistant Secretary of Labor-Management Relations, under Executive Order 11,491, as amended except for those functions related to alleged violations of the standards of conduct for labor organizations pursuant to Section 6(a)(4) of said Executive Order; and,
>
> (b) to the Panel—the functions and authorities of the Federal Service Impasses Panel, pursuant to Executive Order 11,491, as amended.

43 Fed. Reg. 36,037, 36,040–41 (1978). Section 306 of the Reorganization Plan provided that the policies and procedures established under the order would remain in full force and effect.

Executive Order No. 11,491 does mention briefly organization by employees engaged in administering labor-management relations laws. In § 3(d), the order provides: "Employees engaged in administering a labor-management relations law or this Order shall not be represented by a labor organization which also represents other groups of employees under the law or this Order, or which is affiliated directly or indirectly with an organization which represents such a group of employees." Section 3(a) states that the order applies "to all employees and agencies in the executive branch, except as provided in . . . [§ 3(d) above]." "Agency" and "employee" were broadly defined in § 2 of the order and, but for § 3(d), clearly would include employees of the FLRA. It can be argued that Executive Order No. 11,491 did not totally exclude employees engaged in administering labor-management relations law or the order. The order could be said to extend to them as "employees," provided only that they could not be represented by a labor organization which also represents other groups of employees under the law or the order. Apparently, no such coverage ever has been claimed. Obvious administrative difficulties would arise if those responsible for administering the order were also subject to its provisions. We note this provision of the order to indicate, however, that FLRA employees were not expressly prohibited by the Reorganization Plan or Executive Order No. 11,491 from organizing or bargaining collectively.

In 1978, shortly after Reorganization Plan No. 2 was approved by Congress, the Civil Service Reform Act of 1978 was passed. Pub. L. No. 95-454, 92 Stat. 1111 (codified at 5 U.S.C. § 1101 *et seq.*). Title VII of the Act deals with labor-management relations in the executive branch. Section 7104 gives statutory authority to the FLRA; § 7105 describes its powers and duties.[4] Among other things, the FLRA is to provide leadership in establishing policies and guidance relating to matters under Title VII, and generally is responsible for carrying out the purposes of Title VII. The policies underlying Title VII are set forth in § 7101. In that section, Congress finds that labor organization and collective bargaining in the civil service are in the public interest.

With these general guidelines in mind, we turn to the specific references in Title VII to collective bargaining by FLRA employees. Title VII defines "agency" more narrowly than does Executive Order No.

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[4] Title VII did not supersede Executive Order No. 11,491. Section 7135(b) provides that "[p]olicies, regulations, and procedures established under and decisions issued under [any executive order in effect on the effective date of Title VII], shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulation or decisions issued pursuant to this chapter."

11,491. It provides that "agency" means "an Executive agency . . . but does not include . . . (F) the Federal Labor Relations Authority; or (G) the Federal Services Impasses Panel . . ." 5 U.S.C. § 7103(a)(3). Thus, at the outset, Congress excluded those offices from coverage under the Act. The legislative history does not explain why they were excluded.[5] It does not reveal whether Congress intended thereby to preclude them from participating in any labor relations system or whether it simply thought that such employees could not impartially participate in a system they themselves were administering. As you suggest in your request, the latter is the more reasonable interpretation.

This conclusion is supported by other provisions in Title VII. In § 7101(a), Congress finds that the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them safeguards the public interest and contributes to the effective conduct of public business. Section 7101(b) requires that Title VII be interpreted in a manner consistent with the requirement of an effective and efficient government, which Congress finds is promoted by collective bargaining and participation in labor organizations. Thus, if, as you state, you find that significant benefits of the type contemplated by Congress in passing Title VII would accrue both to the FLRA and to the public from a labor relations system for FLRA employees, the Act should not be construed to prevent establishment of such a system.

That Title VII was not intended to prevent establishment of such a system is further supported by § 7112(b) and § 7112(c). Section 7112(b) provides that the FLRA shall not determine a unit to be appropriate for employee representation if it includes "an employee engaged in administering the provisions of this chapter." Section 7112(c) provides:

> Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization—
>
> (1) which represents other individuals to whom such provision applies; or
>
> (2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

The inclusion of these sections, restricting unit determination to those units not including FLRA employees and specifying that an FLRA employee may not be represented by an organization which represents individuals covered by Title VII, suggests that FLRA employees may be represented by other labor organizations. Representative Udall, who proposed the adoption of the version containing this language, analyzed this section as follows:

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[5] The exclusion did not appear in the early versions of the Act. *See, e.g.*, H.R. 1589, § 3(c), 95th Cong., 1st Sess. (1977); H.R. 9094, § 2, 95th Cong., 1st Sess. (1977); S. 2640, § 701, 95th Cong., 2d Sess. (1978). The subsequent amendment excluding the FLRA and the Impasses Panel is not explained in the committee reports. *See* H.R. Rep. No. 1403, 95th Cong., 2d Sess. 39 (1978); S. Rep. No. 969, 95th Cong., 2d Sess. 97 (1978).

> Subsection (c) of the substitute provides that any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization which represents other individuals to whom such provision applies, or which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies. This provision, which is not found in the reported Title VII, is intended to help prevent conflicts of interest and appearances of conflicts of interest. For example, an employee of the National Labor Relations Board could not, under this provision, be represented by a labor organization which is subject to the National Labor Relations Act, or which is affiliated with an organization which is subject to the National Labor Relations Act.

124 Cong. Rec. 29,183 (1978). If Congress intended to preclude FLRA employees from participation in any system, it is unlikely that these provisions would be included without further explanation or limitation. We conclude, therefore, that neither Executive Order No. 11,491 nor Title VII precludes the FLRA and other offices administering federal labor-management relations law from establishing a collective bargaining system for their employees.

Nor does any other federal statute or judicial decision we have found preclude the establishment of such a system. The right of public employees to organize collectively and to select representatives for the purposes of engaging in collective bargaining has been labeled a fundamental right. *United Federation of Postal Clerks* v. *Blount,* 325 F. Supp. 879, 883 (D.D.C.), *aff'd,* 404 U.S. 802 (1971). At least one federal agency, the Department of the Interior, has collectively bargained with some of its employees over a period of several decades without statutory authorization. Although this practice was reported to Congress, Congress made no attempt to halt it. *See Recognition of Organizations of Postal and Federal Employees: Hearings on H.R. 6 and Related Bills, Before the House Comm. on Post Office and Civil Service,* 85th Cong., 2d Sess. 275 (1958).[6] In floor debate on Title VII, Representative Ford of Michigan stated: "Collective bargaining is not new to the Federal Government. Under Executive orders, 58 percent of the work force has been organized into exclusive bargaining units, and agreements have been negotiated covering 89 percent of those organized." 124 Cong. Rec. 25,721 (1978).

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[6] An attachment to H.R. Rep. No. 2311, 82d Cong., 2d Sess. 8-12 (1952), entitled "Policy Memorandum Covering General Labor Relations Policy For Ungraded Employees of the Department of the Interior," describes the labor relations system administered by that Department.

A substantial number of state cases have declared that absent statutory authorization, governmental bodies have no power to enter into binding agreements with an exclusive bargaining agent of public employees. *See, e.g., International Union of Operating Engineers, Local Union No. 321 (AFL-CIO)* v. *Water Works Bd.*, 163 So.2d 619, 622 (Ala. 1964); *State Bd. of Regents* v. *United Packing House Food & Allied Workers, Local No. 1258*, 175 N.W.2d 110, 113 (Iowa 1970); *Board of Trustees* v. *Public Employees Council No. 51, AFL-CIO*, 571 S.W.2d 616, 621 (Ky. 1978); *Minneapolis Federation of Teachers Local 59, AFL-CIO* v. *Obermeyer*, 147 N.W.2d 358, 366 (Minn. 1966); *City of Springfield* v. *Clouse*, 206 S.W.2d 539, 542–47 (Mo. 1947). These courts generally have based their holdings on the principle that public employers derive their power from the legislature and they cannot abdicate or bargain away the power thus delegated to them. From this, these courts concluded that public employers must have specific statutory authority to bargain collectively. However, these cases can be distinguished from the proposed FLRA system.

Most of these state courts do recognize the right of public employees to organize and to elect agents to meet with their employers. They recognize that the employers have the option, although not the duty, to meet with representatives of employees. For the reasons stated above, the courts refused, however, to sanction either recognition of exclusive bargaining agents or binding arbitration agreements. But in none of these cases had the state legislature established a comprehensive labor-relations system for its employees. In none had the state legislature declared that collective bargaining in the civil service was in the public interest.

On the other hand, some other state courts have approved collective bargaining involving public employees absent specific statutory authorization. In *Chicago Division of the Illinois Ed. Assoc.* v. *Board of Education*, 222 N.E.2d 243, 251 (Ill. App. 1966), the court concluded that the board of education did not need specific legislative authority to enter into a collective bargaining agreement with a sole bargaining agent selected by its teachers and that such an agreement was not against public policy. Apparently the court accepted the board's arguments that the existing general legislation authorizing the board to employ the teachers was sufficient and that collective bargaining does not necessarily (and would not in that particular case) involve an illegal delegation of power to a bargaining agent or other third party. *See also Local 266, International Bro. of Electrical Workers* v. *Salt River Project Agric. Improvement and Power Dist.*, 275 P.2d 393, 397 (Ariz. 1954).

The FLRA clearly has the authority to employ a staff to carry out its responsibilities. 5 U.S.C. § 7105(d). The Federal Service Impasses Panel also is given authority to appoint such individuals as the Panel finds necessary for the proper performance of its duties. 5 U.S.C. § 7119(c)(4). In addition, the FLRA is given broad authority to "take such other actions as are necessary and appropriate to effectively administer the provisions" of Title VII. 5 U.S.C. § 7105(a)(2)(I). Given the broad authority of the FLRA and its component agencies, and the clear policy established by Congress in § 7101, we conclude that the FLRA may establish a labor relations system for its employees. Such a system must, of course, comply with Title VII and other relevant laws and executive orders. The FLRA should be particularly mindful of the necessity to avoid real or apparent conflicts of interest. *See* p. 8, *supra.*

II.

As stated earlier, we concur in your view that such a labor relations system may not provide for binding arbitration by an outside third party. Whatever system may be established, final decisions legally must rest with the public employer. A federal official may not delegate to a private party decisionmaking authority which has been vested in him or her by Congress. *See generally* 1 K. Davis, Administrative Law Treatise § 3.12 (2d ed. 1978 & Supp. 1980). Absent a binding arbitration clause, a collective bargaining system need not shift the final decisionmaking authority from the public employer. The FLRA, for example, reasonably could refuse to agree to terms of a bargaining agreement which it felt was not in the public interest. The government body would not be compelled to agree with the union representative, or otherwise to relinquish its decisionmaking authority.

In the absence of federal authority on this question, state cases again are instructive. In *Board of Education* v. *Rockford Education Assoc.*, 280 N.E.2d 286, 287 (Ill. App. 1972), the court held that the board could not, through a collective bargaining agreement or otherwise, delegate to another party those matters of discretion that are vested in the board by statute, such as the matters involving the appointment of teachers and the fixing of salaries. The court explained that although the board did not need specific legislative authority to enter into a collective bargaining agreement, the ultimate determination of "qualification" for a given job could not be delegated by the board to any outside agency, including the American Arbitration Association. *Id.* at 288. In *Gary Teachers Union Local No. 4* v. *School City of Gary*, 284 N.E.2d 108, 114 (C.A. Ind. 1972), the court held, with one judge dissenting, that the school could enter into a binding arbitration agreement. This decision was based, however, on the conclusion that the Indiana Uniform Arbitration Act is broad enough to include public employment.

Sections 13 and 17 of Executive Order No. 11,491 did allow binding arbitration in the absence of specific legislative authorization therefor. Such arbitration was limited, however, to operation within the system established by the order. Section 17 provided that arbitration could be used by the parties only when authorized or directed by the Impasses Panel. The question whether a matter was subject to arbitration under an existing agreement could be submitted to the Assistant Secretary of Labor for decision. Executive Order No. 11,491, § 13(d). If arbitration did occur, either party could file exceptions to the arbitrator's award with the Federal Labor Relations Council. *Id.* at § 13(b). Under this system, arbitral decisions were not truly "binding" in that ultimate authority to resolve appeals was vested in an executive body. The system established by Title VII also places ultimate responsibility on an executive body—the FLRA. 5 U.S.C. § 7122(a). There is no executive body, however, to which appeals from binding arbitral decisions in FLRA disputes could be addressed.

If the FLRA believes that advisory arbitration would promote the efficient and effective conduct of its affairs, such a clause legally is permissible. As early as 1962, advisory arbitration was authorized in federal employment. *See* Executive Order No. 10,988, § 8(b) (1962) (revoked by Executive Order No. 11,491).

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

Dual Membership of an Individual on Two Federal Advisory Committees

There are no legal constraints, including the conflict of interest laws, that would rule out an individual's concurrent membership on two federal advisory committees.

Per diem compensation received for service on a federal advisory committee does not constitute a salary from the federal government so as to disqualify an individual receiving such compensation from membership on the President's Nuclear Safety Oversight Committee.

July 2, 1980

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This is in response to your inquiry whether there are any legal constraints that rule out the concurrent membership of Mr. C on two advisory committees, the Nuclear Regulatory Commission's Advisory Committee on Reactor Safety (ACRS) and the President's Nuclear Safety Oversight Committee (Oversight Committee).

It should be noted at the outset that 5 U.S.C. § 5533(d) in effect permits an individual to hold appointments simultaneously from more than one agency to perform for them, respectively, intermittent advisory duties on a "when-actually-employed basis," and that it allows him to receive pay for all of his work if it is not "for the same hours of the same day."

Section 1-101 of Executive Order No. 12,202, March 18, 1980, which established the Oversight Committee, provides that its membership of six persons shall be composed of "citizens who do not receive a *salary* from the Federal government" (emphasis added). Mr. C was at the time of his appointment to that committee and still is a member of ACRS. He receives per diem compensation for each day of his work for it. 42 U.S.C. § 2039. The question arises whether such compensation constitutes salary so as to disqualify him for a seat on the Oversight Committee. In our opinion it does not. The quoted language from Executive Order No. 12,202 was obviously intended to do no more than limit the Oversight Committee's membership to persons who are not regular employees of the government. Mr. C, who is on the faculty of a university, and his four colleagues all fit into that category. Moreover, his payment by ACRS on a per diem basis does not fall within the standard dictionary definition of "salary" as "fixed compensation paid regularly for services," a definition that we think should ordinarily be followed where a different one is not supplied.

Turning to the conflict of interest laws, we find that only 18 U.S.C. § 208 need be mentioned here as conceivably having any relevance to Mr. C's dual employment. That statute prohibits a federal employee from participating as such in a particular matter in which, among others, he or his employer has a financial interest. If applicable, § 208 would prevent Mr. C from participating in an Oversight Committee matter in which ACRS, another one of his employers, has a "financial interest." However, the statute is not applicable and Mr. C would not be barred because ACRS, which has no proprietary functions, cannot be said to have a financial interest in any matter within the meaning of § 208. Mr. C would, of course, be barred from participating in a matter before either committee in which he personally or his university had a financial interest

Mr. C's dual officeholding does not cut across any of the restrictions imposed by Executive Order No. 11,222 of May 8, 1965. Like 18 U.S.C. § 208, those restrictions are directed to conflicts of interest, appearances of such conflicts, etc., that arise from the financial interests of a federal employee or persons with whom he is connected.

Finally, we believe it pertinent to mention that a number of 19th century precedents speak of a nonstatutory prohibition against a person's holding two "incompatible" offices. *See, e.g., Crosthwaite* v. *United States,* 30 Ct. Cl. 300 (1895), *rev'd on other grounds,* 168 U.S. 375; 22 Op. Att'y Gen. 237 (1898). All these cases involved a person's filling two government positions that carried operational responsibilities and in none, so far as our research has revealed, was there a finding of incompatibility. Assuming that these precedents have any validity today, we are of the view that they are nevertheless not apt here if only because both the Oversight Committee and ACRS are collegial bodies and both have merely advisory functions.

In sum, we see no legal hindrance to Mr. C's continuing his service to both advisory committees.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

Transportation of Federal Prisoners to State Courts Pursuant to Writs of Habeas Corpus

The Attorney General needs no specific statutory authorization in order to surrender custody of a federal prisoner to state authorities for transportation to a state court pursuant to a writ of habeas corpus, and no federal statute prohibits it.

Surrendering a federal prisoner to the temporary physical custody and control of state officers does not result in a loss of federal jurisdiction over the prisoner.

Escape of a federal prisoner temporarily in the custody of state authorities pursuant to the direction of the Attorney General would violate the federal escape statute, 18 U.S.C. § 751.

July 25, 1980

MEMORANDUM OPINION FOR THE DIRECTOR, BUREAU OF PRISONS

This responds to your request for our opinion whether federal prisoners may be released to the physical custody of state law enforcement officers for transportation to a state court pursuant to the issuance of a writ of habeas corpus *ad testificandum* or *ad prosequendum.*[1] You also have requested our opinion whether escape by a prisoner thus released could be prosecuted as escape from federal custody under 18 U.S.C. § 751 (Supp. I 1977).

The United States Marshals Service (USMS) concludes that the Bureau of Prisons (BOP) may relinquish custody temporarily to state officials on state court writs without waiving federal jurisdiction or violating federal law. The USMS further concludes that a federal prisoner who escapes from such temporary state custody has violated 18 U.S.C. § 751. In your view, a federal prisoner may not be released from the physical custody of federal agents without specific statutory authorization, because federal custody must remain unbroken. You also suggest that if a federal prisoner who is released to state officials escapes, he could not be prosecuted under the federal escape statute.

For reasons stated more fully below, we conclude that federal jurisdiction over a prisoner committed to the custody of the Attorney General is not waived or otherwise lost if physical custody is surrendered temporarily to state officials for the purpose of producing the prisoner in a state court pursuant to the issuance of a writ of habeas corpus *ad testificandum* or *ad prosequendum*. We conclude that specific statutory authorization is not required for such a temporary transfer of custody, and we have found no statute which expressly or impliedly prohibits it. We further conclude that escape by a federal prisoner while in the temporary custody of state officials would violate the federal escape statute.

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[1] Your question, and accordingly, this response, are limited to situations to which the Interstate Agreement on Detainers, 18 U.S.C. Appendix, does not apply either because the requesting state is not a party to the Agreement or because the request for production is pursuant to a writ of habeas corpus *ad testificandum,* and thus not within the scope of the Agreement.

I.

In 1922, the Supreme Court settled the question whether a federal prisoner could be taken on a writ of habeas corpus to a state court and there prosecuted on state charges. *Ponzi* v. *Fessenden*, 258 U.S. 254 (1922). Ponzi argued, *inter alia*, that the state court could not try him without jurisdiction over his person and that, as a prisoner of the United States, he was "within the dominion and exclusive jurisdiction" of the United States *Id.* at 258. The Court rejected this argument, describing it as "a refinement which if entertained would merely obstruct justice," and stated:

> The trial court is given all the jurisdiction needed to try and hear him by the consent of the United States, which only insists on his being kept safely from escape or from danger under the eye and control of its officer. This arrangement of comity between the two governments works in no way to the prejudice of the prisoner or of either sovereignty.

Id. at 265-66. The Court emphasized that our scheme of government, with the federal government and the governments of the several states each having their own system of courts, requires "not only definite rules fixing the powers of the courts in cases of jurisdiction over the same persons and things . . . but also a spirit of reciprocal comity and mutual assistance to promote due and orderly procedure." *Id.* at 259. Physical custody of the federal prisoner was not an issue in *Ponzi*, however. A federal agent at all times had custody, and the Court, while not expressly relying on this fact as essential to the holding, did note it.

Following the lead of *Ponzi*, federal courts consistently have ruled that the federal government does not lose jurisdiction over a federal prisoner if it, as a matter of comity, arranges to produce a prisoner for prosecution in state court or for service of a state sentence. *See, e.g.*, *Chunn* v. *Clark*, 451 F.2d 1005, 1006 (5th Cir. 1971); *Truesdell* v. *United States*, 400 F.2d 859, 860 (8th Cir. 1968); *Murray* v. *United States*, 334 F.2d 616, 617 (9th Cir. 1964); *Lovell* v. *Arnold*, 391 F. Supp. 1047, 1048 (M.D. Pa. 1975); *United States ex rel. Williams* v. *Fitzpatrick*, 299 F. Supp. 260, 261 (S.D.N.Y. 1969).

As noted in both your opinion request and the USMS memorandum, the past practice consistently has been to transport federal prisoners to state courts in the custody of a federal marshal and to require the states to reimburse the USMS for this expense. Accordingly, the question presented here, which is one of physical custody, has not been addressed directly by the courts. The cases, such as those cited above, which have considered related questions, however, have inferred that temporary transfers of physical custody also are matters of comity to be worked out between federal and state authorities.

In *Allen* v. *Hunter*, 65 F. Supp. 365 (D. Kan. 1946), for example, the court rejected the petitioner's claim that the federal government lost all jurisdiction over him when, after convicting and sentencing him, it permitted him to be returned to the Indiana State Prison. Quoting from the Tenth Circuit in *Wall* v. *Hudspeth*, 108 F.2d 865, 866 (10th Cir. 1940), the court held:

> When the court of one sovereign takes a person into its custody on a criminal charge he remains in the jurisdiction of that sovereign until it has been exhausted, to the exclusion of the courts of the other sovereign. That rule rests upon principles of comity, and it exists between federal and state courts. [Cites omitted.] But either the federal or a state government may voluntarily surrender its prisoner to the other without the consent of the prisoner, and in such circumstances the question of jurisdiction *and custody* is purely one of comity between the two sovereigns, not a personal right of the prisoner which he can assert in a proceeding of this kind.

Allen v. *Hunter*, 65 F. Supp. at 367–68 (emphasis added). *See also Young* v. *Harris*, 229 F. Supp. 922, 924 (W.D. Mo. 1964). The Fifth Circuit in *Chunn* v. *Clark*, *supra*, believed it "well-established" that a prisoner has no standing to contest an agreement between two sovereigns, and thus ruled that federal authorities did not lose jurisdiction over Chunn by complying with an Alabama writ. 451 F.2d at 1006.[2] Similarly, in *Potter* v. *Ciccone*, 316 F. Supp. 703, 705 (W.D. Mo. 1970), the court stated the "well-established" rule that the federal government does not lose jurisdiction of a prisoner because it permits a state "to take the prisoner *into its custody* . . ." (Emphasis added.) The court continued: "Thus, while the temporary custody of the other sovereign may postpone the rights of the first sovereign, it cannot defeat them and jurisdiction is not lost." *Id.* at 705–06.[3]

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[2] Many of these cases have arisen on writs of habeas corpus filed by prisoners seeking either a release from custody or freedom from prosecution. The courts have held that such prisoners have no standing to contest an agreement between two sovereigns concerning the temporary exchange of custody of the prisoners on writs of habeas corpus *ad prosequendum* or their agreement as to the order of prosecution or execution of sentence. *See, e.g.*, *Chunn* v. *Clark*, 451 F.2d 1005 (5th Cir. 1971); *Derengowski* v. *U.S. Marshal*, 377 F.2d 223 (8th Cir. 1967); *Lovell* v. *Arnold*, 391 F. Supp. 1047 (M.D. Pa. 1975).

These issues also have arisen when state authorities have released state prisoners to the custody of federal authorities. Although in many of these cases, actual physical custody was transferred to federal authorities, the courts refused to find a loss of state jurisdiction. In *Bullock* v. *Mississippi,* 404 F.2d 75 (5th Cir. 1968), the prisoner-appellant sought release from a state detainer on the ground that by earlier transferring him to federal custody, the state had waived its right to jurisdiction over him. The court ruled that "[t]he State, by giving temporary custody to the federal authorities does so without a complete surrender of its prior jurisdiction over him." *Id.* at 76. *See also Derengowski* v. *U.S. Marshal,* 377 F.2d 223 (8th Cir. 1967).

These same rules apply when a prisoner is produced pursuant to a writ of habeas corpus *ad testificandum.* In *In re Liberatore,* 574 F.2d 78, 89 (2d Cir. 1978), the court held that: "any 'loan' to the second sovereignty in compliance with such a writ or any other temporary transfer of custody from the sovereignty having the prior jurisdiction cannot affect in any way whatever any final judgment of conviction already entered against the prisoner there or affect the running of the sentence imposed pursuant to that judgment." And, recently, the Ninth Circuit implemented this rule by declaring that a district judge's attempt to transfer a prisoner (who was serving concurrent federal and state sentences in state prison) from state to federal custody violated fundamental principles of comity and separation of powers. *United States* v. *Warren,* 610 F.2d 680 (9th Cir. 1980). The court wrote:

> Determination of *priority of custody* and service of sentence between state and federal sovereigns *is a matter of comity* to be resolved by the executive branches of the two sovereigns . . . [T]he sovereign with priority of jurisdiction, here, the United States, may elect under the doctrine of comity to relinquish it to another sovereign. This discretionary election is an executive, and not a judicial function. [Cites omitted.]
>
> In the federal system, the "power and discretion" to practice comity is vested in the Attorney General.

Id. at 684–85 (emphasis added).

The cases cited above establish that surrendering a prisoner to another jurisdiction for purposes of prosecution, testimony, or service of sentence does not affect a loss of jurisdiction by the surrendering authority. Although most of these cases did not address directly the question you raise other than *in dicta,* we believe that the policies underlying these cases yield the same result here. In our opinion, therefore, Federal jurisdiction is not lost if physical custody and control of Federal prisoners is transferred temporarily to State officers.[4]

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[3] Loss of jurisdiction also has been asserted where a state took into custody a federal defendant who was released from federal custody pending appeal. In *Jones* v. *Taylor,* 327 F.2d 493, 493–94 (10th Cir. 1964), the court rejected this contention because "[w]hen a person is convicted of independent crimes in state and federal courts, the question of jurisdiction *and custody* is one of comity between the two governments and not a personal right of the prisoner" (emphasis added).

II.

In addition to raising jurisdictional questions, you have suggested that custody of a federal prisoner may not be surrendered to state authorities absent congressional authorization. Again relying on *Ponzi* v. *Fessenden, supra,* we believe that, as a general rule, specific statutory authorization is not required. In *Ponzi,* the Court wrote: "There is no express authority authorizing the transfer of a federal prisoner to a state court for [trial]. Yet we have no doubt that it exists and is to be exercised with the consent of the Attorney General." 258 U.S. at 261–62. The Court recited the many duties of the Attorney General with respect to prisons and prisoners, and concluded:

> This recital of the duties of the Attorney General leaves no doubt that one of the interests of the United States which he has authority and discretion to attend to, through one of his subordinates, in a state court, under § 367, Rev. Stats., is that which relates to the safety and custody of United States prisoners in confinement under sentence of federal courts. *In such matters he represents the United States and may on its part practice the comity which the harmonious and effective operation of both systems of courts requires, provided it does not prevent enforcement of the sentence of the federal courts or endanger the prisoner.* *Logan* v. *United States,* 144 U.S. 263.

Id. at 263 (emphasis added).[5]

Although we believe that specific statutory authorization is not required, it is necessary to review relevant statutes to determine whether

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[4] In one sense, federal jurisdiction may be lost if physical custody is relinquished to state authorities. If a state violates doctrines of comity and refuses to return the prisoner to federal authorities, the federal government has no immediate jurisdiction over the prisoner without actual physical custody of the body. Its jurisdiction over the prisoner is limited to its power to enforce the federal sentence once the prisoner is released from state custody.

Unless an enforceable agreement is struck between federal and state authorities, the federal government would be without an adequate immediate remedy if the state refuses to return the prisoner. In that event, absent a violation of the Constitution, law, or treaties of the United States (28 U.S.C. § 2254), the federal government would have to await the release of the prisoner by the state. *See Strand* v. *Schmittroth,* 251 F.2d 590, 604–06 (9th Cir. 1957). The Associate Deputy Attorney General has indicated that this is not a serious practical problem because, if it happened once, no additional prisoners would be released to that state.

[5] *See also United States* v. *Warren,* 610 F.2d 680, 684–85 (9th Cir. 1980). The legislation creating the Department of Justice authorized the Attorney General to send the Solicitor General or any officer of the Department of Justice "to any State or district in the United States to attend to the interests of the United States in any suit pending . . . or to attend to any other interest of the United States." Act of June 22, 1870, § 5, 16 Stat. 162, 163. The current version of this section is 28 U.S.C. § 517.

Congress has prohibited, either expressly or impliedly, exercise of comity in this area by the Attorney General. We find no express statutory prohibition on temporary transfers of custody for the purpose of transporting federal prisoners to state court. The only statute we find which might be read to prohibit impliedly such a transfer is 18 U.S.C. § 4008.[6]

Section 4008 provides: "Prisoners *shall* be transported by agents designated by the Attorney General or his authorized representative" (emphasis added). The question raised by this section is whether it requires that in all cases a federal prisoner must be transported by a federal agent. We believe it should not be interpreted so restrictively. In our opinion, this statute was not intended to cover transportation solely for a state's convenience and upon a state's request.

Section 4008 was designed primarily to authorize payment of transportation expenses.[7] After stating that prisoners shall be transported by designated agents, the section provides: "The reasonable expense of transportation, necessary subsistence, and hire and transportation of guards and agents shall be paid by the Attorney General from such appropriation for the Department of Justice as he shall direct." [8] Similar language first appeared in an 1864 Act, which provided:

> Be it enacted . . . [t]hat all persons who have been, or who may hereafter be, convicted of crime by any court of the United States—not military—the punishment whereof shall be imprisonment, in a district or territory where, at the time of such conviction, there may be no penitentiary or other prison suitable for the confinement of convicts of

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[6] At first glance, 18 U.S.C. § 4085(a) seems to relate to this question. This section provides:

> Whenever any federal prisoner has been indicted, informed against, or convicted of a felony in a court of record of any State or the District of Columbia, the Attorney General shall, if he finds it in the public interest to do so, upon the request of the Governor or the executive authority thereof, and upon the presentation of a certified copy of such indictment, information or judgment of conviction, cause such person, prior to his release, to be transferred to a penal or correctional institution within such State or District.
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> * * * * *
>
> The expense of personnel and transportation incurred shall be chargeable to the appropriation for the "Support of United States prisoners."

This section, however, does not address the issue of temporary transfer of custody. It is distinguishable from the situations under review because it contemplates transfer immediately prior to expiration of the federal sentence so that upon release the prisoner is subject to the state authority. *See* S. Rep. No. 1410, 76th Cong., 3d Sess. 1 (1940); H.R. Rep. No. 1885, 76th Cong., 1st Sess. 1–2 (1940).

[7] If a section heading is enacted as part of an act or as part of a code, one may look to the heading as an aid to the legislative intent. *Knowlton* v. *Moore*, 178 U.S. 41.77 (1849); *Clawans* v. *Sheetz*, 92 F.2d 517, 521 (D.C. Cir. 1937); Sutherland, Statutes and Statutory Construction § 47.14 (1973 & Supp. 1978). Section 4008 is headed "Transportation expenses," suggesting that the primary purpose of the statute was to authorize payment for such expenses.

[8] The remainder of the section provides:

> Upon conviction by a consular court or court martial the prisoner shall be transported from the court to the place of confinement by agents of the Department of State, the Army, Navy, or Air Force, as the case may be, the expense to be paid out of the Treasury of the United States in the manner provided by law.

> the United States, and available therefor, shall be confined . . . in some suitable prison in a convenient state or territory to be designated by the Secretary of Interior, *and shall be transported and delivered to the warden or keeper of the prison by the marshal . . . the reasonable actual expense of transportation, necessary subsistence and hire, and transportation of guards and the marshal . . . to be paid by the Secretary of the Interior, out of the judiciary fund. . . .*

Act of May 12, 1864, § 1, 13 Stat. 74, 74–75 (emphasis added).[9] This section further provided that if, in the opinion of the Secretary, the expense of transportation would exceed the cost of maintaining a prisoner in a jail in the state of his conviction, then it would be lawful so to confine him. This measure passed the Congress with no recorded floor debate on its provisions. 64 Cong. Globe, 38th Cong., 1st Sess. 1684 (1864); 65 Cong. Globe 38th Cong., 1st Sess. 2207 (1864). The text of the Act suggests that its purpose was to resolve the question where federal prisoners should be incarcerated if there was no suitable penitentiary in the state or territory of conviction. The transportation provision, authorizing transportation and delivery to a suitable prison, was part of the resolution of this question.[10]

In 1876, responsibility for designating places of confinement was transferred to the Attorney General. Act of July 12, 1876, 19 Stat. 88–89. This Act also amended the Act of May 12, 1864, *supra,* by allowing the Attorney General to change the place of imprisonment as necessary. The transportation provisions in the Act were not substantively altered, however. They provided that prisoners "shall be transported and delivered to the warden . . . by the marshal . . . the reasonable actual expense of transportation, necessary subsistence, and hire and transportation of guards and the marshal . . . to be paid by the Attorney General, out of the judiciary fund." *Id.* An 1891 statute authorizing the establishment of three United States prisons also contained a section providing that transportation of all United States prisoners and their delivery to United States prisons shall be by the marshal and allowed the same expenses as did the previous statutes.[11] The language was

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[9] Prior to that time, statutes allowed costs to United States Marshals for "transporting criminals." *See* Act of Feb. 26, 1853, 10 Stat. 165.

[10] A similar statute, providing for the confinement of juvenile offenders, and their transportation to the place of confinement by the marshal, was passed in 1865. Act of March 3, 1865, § 1, 13 Stat. 538. This Act provided:

> Be it enacted . . . [t]hat juvenile offenders . . . shall be confined . . . in some house of refuge to be designated by the Secretary of the Interior, and shall be transported and delivered to the warden or keeper of such house of refuge by the marshal . . . and the reasonable actual expense of the transportation, necessary subsistence, and hire, and transportation of assistants and the marshal or warden, only shall be paid by the Secretary of the Interior, out of the judiciary fund.

[11] Act of March 3, 1891, § 5, 26 Stat. 839, 839–40. Section 5 provided:

> That the transportation of all United States prisoners convicted of crimes against the laws of the United States in any State, District or Territory, and sentenced to terms of

Continued

again amended in 1901, but, again, the substance of the transportation provisions was not changed. Act of March 3, 1901, 31 Stat. 1450–51. The legislative history of these acts is brief and the transportation provisions are not specifically addressed. 4 Cong. Rec. 2339, 4268 (1876); 22 Cong. Rec. 2925, 3563–64 (1891).

In 1930, Congress created the Bureau of Prisons and revised the laws relating to federal prisoners. The law regarding transportation of prisoners was amended to read substantially as it does today. As enacted at that time, it provided:

> All transportation of prisoners shall be by such agent or agents of the Department of Justice as the Attorney General or his authorized representative shall from time to time nominate, the reasonable expense of transportation, necessary subsistence, and hire and transportation of guards and agent or agents to be paid by the Attorney General from any appropriation to the Department of Justice as he may direct. . . . .

Act of May 14, 1930, Pub. L. No. 71–218, § 8, 46 Stat. 325, 328. The major change was that "all transportation" shall be by "an agent or agents of the Department of Justice," rather than that transportation and delivery of prisoners to the place of confinement shall be by the marshal. The legislative history of this 1930 modification does not explain why these changes were made. The committee reports do indicate that the act resulted from concern about the lack of proper care and supervision of the increasing number of federal prisoners. H.R. Rep. No. 106, 71st Cong., 2d Sess. 1 (1930). The few federal penitentiaries were congested and "great masses" of federal prisoners were held in local jails and workhouses, some of which were considered "unsanitary and generally deplorable." S. Rep. No. 533, 71st Cong., 2d Sess. 1, 2 (1930). Accordingly, these reports and the floor debates concentrate on a program to provide adequate prison facilities and a proper organization to administer the federal penal system. 72 Cong. Rec. 2157–58 (1930). The only reference to the bill's transportation section in either report is a reference found in an attached Attorney General's analysis of the bill. That analysis stated: "Section 8 of the proposed bill clarifies how prisoners may be transported and the fund which is chargeable." H.R. Rep. No. 106, *supra*, at 3; S. Rep. No. 533, *supra*, at 3. There is no indication, however, that Congress intended that section to extend beyond its prior coverage of transportation and delivery to a place of

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imprisonment in a penitentiary, and their delivery to the superintendent, warden, or keeper of such United States prisons, shall be by the marshal of the District or Territory where such conviction may occur, after the erection and completion of said prisons. That the actual expenses of such marshal, including transportation and subsistence, hire, transportation and subsistence of guards, and the transportation and subsistence of the convict or convicts, be paid, on the approval of the Attorney General out of the judiciary fund.

confinement or that it intended to restrict the Attorney General's broad discretionary authority as to the care and custody of federal prisoners.

In light of this legislative history, it is not necessary to assume that by providing that the expenses of all transportation were to be paid by the Attorney General, the Congress intended that transportation requested by a state for purposes unrelated to the federal conviction or incarceration be paid by the federal government. Nor is it necessary to interpret the statement that prisoners "shall be transported" by agents designated by the Attorney General as precluding the Attorney General from promoting comity among sovereigns by exercising his authority to approve temporary transfers of custody. Rather, we believe it is more reasonable to conclude that Congress intended § 4008 to provide for transportation for federal purposes, such as transportation from the court of conviction to the place of confinement as did the previous statutes on which that section is based. The "clarification" mentioned in the committee reports most likely referred to the authorization for any agent designated by the Attorney General to transport prisoners rather than the marshal exclusively.

In the 1948 codification of the United States Criminal Code, the section was revised to its present form.[12] Act of June 25, 1948, Pub. L. No. 80-772, § 4008, 62 Stat. 683, 849. It was explained in a committee report that the revisions were "[m]inor changes in phraseology," not substantive changes. H.R. Rep. No. 304, 80th Cong., 1st Sess. A179 (1947). *See Muniz* v. *Hoffman,* 422 U.S. 454, 468–70 (1975). We conclude, therefore, that § 4008 does not prohibit the Attorney General from making arrangements for state law enforcement officers to assume temporary custody of federal prisoners for the purpose of production in a state court, pursuant to a writ of habeas corpus. Nor have we found any other federal statute which prohibits such action.

We emphasize that this memorandum addresses only those circumstances in which the Interstate Agreement on Detainers (IAD) is not applicable.[13] If the state is a party to the IAD, the procedures established under it may be exclusive. *See United States ex rel. Escola* v. *Groomes,* 520 F.2d 830, 837–38 (3d Cir. 1975). Even if the state involved is not a party to the IAD, that agreement should be used as a guide for all temporary transfers of custody, for state prosecution or testimony. The party states of the IAD, which now include the federal government and approximately 42 states, find that proper proceedings on charges emanating from other jurisdictions cannot be had in the absence of cooperative procedures, and declare that the purpose of the

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[12] In 1949, the third paragraph of the section, dealing with prisoners convicted by a consular court or court martial, was amended. Act of May 24, 1949, Pub. L. No. 81-72, § 4121, 63 Stat. 89, 98. These amendments do not affect the first and second paragraphs of the section with which we are concerned here.

[13] *See* note 1, *supra.*

IAD is to provide such procedures.[14] The Department of Justice initiated and supported congressional adoption of the IAD because existing procedures were inadequate. *See* H.R. Rep. No. 1018, 91st Cong., 2d Sess. 3 (1970).

To avoid the damaging effects of detainers on prisoners, the IAD guarantees certain procedural rights to prisoners. For example, prison authorities are required to inform prisoners of all charges on the basis of which detainers have been lodged. Prisoners may then request a trial on the charges and if such trial does not commence within 180 days, the charges must be dismissed with prejudice. A non-IAD agreement to transfer custody to a state for purposes of prosecution should include all legally available safeguards of both the prisoner's and the government's interests. A state, by refusing to become party to the IAD, should not be able to avoid entirely the procedural requirements of it while securing its benefits.[15]

III.

As you suggested in your request, additional legal questions may arise from such temporary transfers of custody. You requested that we address one such problem—escape from custody. The federal escape statute, 18 U.S.C. § 751(a) (Supp. I 1977) provides:

> Whoever escapes or attempts to escape from the custody of the Attorney General or his authorized representative, or from any institution or facility in which he is confined by direction of the Attorney General, or from any custody under or by virtue of any process issued under the laws of the United States by any court, judge, or commissioner, or from the custody of an officer or employee of the United States pursuant to lawful arrest, shall [be fined or imprisoned, or both].

The question raised here is whether escape from the temporary custody of the state law enforcement officers would violate this statute.

This section was first enacted in 1930, when the Bureau of Prisons was established. It read:

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[14] IAD, Art. I, 18 U.S.C. Appendix. When the IAD was enacted by Congress, 28 states were parties to it. Congress expected that the remaining 22 states would become partners as soon as their legislatures next met. 116 Cong. Rec. 38,841 (1970) (remarks of Sen. Hruska).

[15] We do not believe that Congress intended the IAD to be the exclusive means of transfer of custody in all cases, thereby precluding transfer if the requesting state is not a party to it. Such an interpretation is not supported by the language of the Agreement or its legislative history and would exacerbate, for non-party states, the problems the Agreement is directed toward ameliorating. It would preclude any transfers to non-party states for purposes of prosecution, for example, thus leaving prisoners with no way of clearing detainers filed against them and precluding prosecutors from bringing defendants to trial within a reasonable time after charges are filed. This would result in dismissal of charges not timely prosecuted. *See Dickey* v. *Florida*, 398 U.S. 30 (1970).

> Any person properly committed to the custody of the Attorney General or his authorized representative or who is confined in any penal or correctional institution, pursuant to the direction of the Attorney General, who escapes or attempts to escape therefrom shall be guilty of an offense. . . .

Act of May 14, 1930, Pub. L. No. 71-218, § 9, 46 Stat. 327. In the Attorney General's analysis of this Act prior to its enactment, he explained that there was "no statutory penalty for escaping from the custody of a Federal prison or Federal officers." H.R. Rep. No. 106, *supra* at 3; S. Rep. No. 533, *supra* at 3. Since 1930, the section has been modified to clarify ambiguities and to broaden its scope. For example, in 1935, Congress added the phrase "[any person] who is in custody by virtue of any process issued under the laws of the United States by any court, judge, or commissioner." Act of Aug. 3, 1935, Pub. L. No. 74-233, 49 Stat. 513, 513-14. In 1948, several amendments were made to remove ambiguities and to improve phraseology. Act of June 25, 1948, Pub. L. No. 80-772, § 751, 62 Stat. 683, 734. *See* H.R. Rep. No. 304, 80th Cong., 1st Sess. A67 (1947).

The term "custody," as it is used in this statute, has been defined very broadly. Although none of the cases deal with the specific situation presented here, they are sufficiently analogous to support the conclusion that such escape would violate § 751. For example, in *United States* v. *Eaglin*, 571 F.2d 1069 (9th Cir. 1977), the court concluded that a prisoner serving concurrent state and federal sentences in a state penitentiary who failed to return after he was released on a "social" pass violated § 751. The court reasoned that 18 U.S.C. § 4082(b) provides that a federal sentence may be served in an institution not maintained by the federal government and that "an escape from a State institution is an escape from the custody of the Attorney General if the prisoner has been confined there under the authority of the Attorney General." *Id.* at 1073. The Ninth Circuit in an earlier case identified the three elements which must be proved to sustain a conviction under § 751: "(a) that there was a prior federal conviction; (b) that there was an escape; and (c) that such escape was from a confinement arising by virtue of the conviction." *Hardwick* v. *United States*, 296 F.2d 24, 26 (9th Cir. 1961). The court found no basis to the defendant's argument that the prisoner be in the actual physical custody of a federal official. Similarly, in *McCullough* v. *United States*, 369 F.2d 548, 550 (8th Cir. 1966), the court held that § 751 punishes "escape from custody or from any facility in which the prisoner is confined by direction of the Attorney General." If the Attorney General, through the BOP, enters into an agreement with state officials in which the state officials agree to keep the prisoner safely confined, the prisoner would be confined by virtue of the federal conviction and by direction of the Attorney General.

In *United States* v. *Bailey*, 585 F.2d 1087 (D.C. Cir. 1978), the court upheld a conviction under § 751 of a federal prisoner who escaped from custody after being transferred to a local jail pursuant to a writ of habeas corpus *ad testificandum*. The court ruled:

> [We decide] that a prisoner who has been committed to the custody of the Attorney General by virtue of a conviction is still in the custody of the Attorney General by virtue of that conviction for the purposes of Section 751(a) when he is transferred pursuant to a writ of *habeas corpus ad testificandum* and confined in an institution designated by the Attorney General for the custody of federal prisoners. Policy considerations support at least this broad an interpretation of Section 751. The jurisdiction from which a prisoner is brought pursuant to a writ of *habeas corpus* has a significant interest in preventing the prisoner's escape from custody. This interest has been recognized in an analogous situation by the drafters of the Interstate Agreement on Detainers (IAD), who provided that when a prisoner serving a sentence in one jurisdiction is brought to another jurisdiction for trial on another offense and escapes while in the receiving jurisdiction, he may be prosecuted under the escape statute of the sending jurisdiction.

585 F.2d at 1104 (footnote omitted). We conclude, therefore, that escape from state law enforcement officers by a prisoner who is in custody pursuant to a federal conviction and is confined under the direction of the Attorney General violates § 751.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

Appropriations Limitation for Rules Vetoed by Congress

The Presentation Clauses of the Constitution, Article I, § 7, clauses 2 and 3, require amendments of funding statutes, whether achieved through a legislative disapproval mechanism or otherwise, to be presented to the President in order to have the force of law.

Congress cannot use its power to appropriate money to circumvent general constitutional limitations on its power.

August 13, 1980

MEMORANDUM OPINION FOR THE ATTORNEY GENERAL

This responds to your request for our views on the constitutionality of Congressman Levitas' amendment to H.R. 7584, the fiscal year 1981 appropriations bill for the Department of State, Justice, Commerce, related agencies, and the Judiciary.[1] The purpose of the amendment, which was adopted by the House of Representatives by a voice vote on July 23, 1980, is to prevent the use of funds appropriated under the bill to administer or enforce any regulation which Congress has disapproved by legislative veto. 126 Cong. Rec. 19,313 (1980). For reasons stated below, we believe that the amendment is unconstitutional to the extent that it would be invoked by the exercise of power purportedly granted by any legislative veto device, at least where that exercise occurs subsequent to the enactment of the appropriations bill.[2]

The amendment provides:

> Sec. 608. None of the funds appropriated or otherwise made available by this Act shall be available to implement, administer, or enforce any regulation which has been disapproved pursuant to a resolution of disapproval

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[1] The related agencies are: Arms Control and Disarmament Agency; Board for International Broadcasting; Commission on Civil Rights; Commission on Security and Cooperation in Europe; Department of the Treasury, Chrysler Corp. Loan Guarantee Program; Equal Employment Opportunity Commission; Japan-United States Friendship Commission; Legal Services Corporation; Marine Mammal Commission; Office of the United States Trade Representative; Securities and Exchange Commission; Select Commission on Immigration and Refugee Policy; Small Business Administration; United States Metric Board.

[2] Mr. Levitas offered an identical amendment to the fiscal year 1981 appropriations bill for Agriculture, rural development, and related agencies (H.R. 7591). The amendment was adopted, 126 Cong. Rec. 20,507 (1980). Our views stated herein regarding the Levitas amendment to H.R. 7584 apply equally to its presence in H.R. 7591 or other appropriations bills.

> duly adopted in accordance with the applicable law of the United States.

This amendment is apparently intended to permit Congress to accomplish two distinct legislative acts with one set of votes. A vote under the legislative veto provision of some substantive statute, disapproving a rule promulgated by a covered agency, would not only have the purported effect of disapproving the rule, but would also effectively amend the terms of H.R. 7584 by imposing an unconditional limitation on a previously permissible expenditure of funds.[3] For example, if Congress, pursuant to § 7(b) of the Civil Rights of Institutionalized Persons Act (Pub. L. No. 96-247), voted to disapprove the Attorney General's standards for prisoners' administrative remedies,[4] the vote would also effect a limitation on title II of H.R. 7584, which designates the functions of this Department for which funds are available.

Congress can undoubtedly amend a previously enacted appropriation act to impose additional limitations on the use of appropriated funds. The question raised by this proposal is whether Congress can do so without presenting the amending legislation to the President for his approval or disapproval. This Department has consistently taken the position that the Presentation Clauses of the Constitution mandate the President's participation in the lawmaking process—no matter what form that process takes.[5] You recently reiterated this position in a formal opinion to the Secretary of Education:

> I believe it is manifest, from the wording of clause 3 and the history of its inclusion in the Constitution as a separate clause apart from the clause dealing with "bills," that its purpose is to protect against *all* congressional

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[3] Alternatively, by its terms the amendment could be interpreted as covering only rules which have already been the subject of a legislative veto at the time of the bill's enactment. Under this interpretation, there would be no constitutional problem. It is undoubtedly permissible for Congress to send an appropriations bill to the President in which functions that are denied funding are designated in any identifiable manner. It is our practice to interpret statutes in ways that avoid constitutional infirmities, whenever possible. *See, e.g., Kent* v. *Dulles*, 357 U.S. 116 (1958). For two reasons, however, such an interpretation seems unavailable here. First, since we are aware of no rules promulgated by the agencies covered by H.R. 7584 that have been vetoed by Congress, an interpretation of the amendment that confined it to retroactive effect would have no meaningful purpose. Second, Mr. Levitas' statements in support of the amendment appear clearly to contemplate that it will apply to future legislative vetoes. 126 Cong. Rec. 19,312-19,313 (1980). If, however, before final enactment of H.R. 7584 a regulation of a covered agency should be subjected to a legislative veto, it might be possible to interpret this provision narrowly, to avoid the constitutional issue. This would depend, of course, on subsequent legislative history.

[4] The Act provides: "[T]he Attorney General shall . . . promulgate minimum standards . . . The Attorney General shall submit such proposed standards for publication in the Federal Register . . . Such standards shall take effect thirty legislative days after publication unless, within such period, either House of Congress adopts a resolution of disapproval of such standards." 42 U.S.C. § 1997e(b)(1).

[5] Article I, § 7, cl. 2 of the Constitution provides: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes a Law, be presented to the President . . ." Article I, § 7, cl. 3 supplements this by prescribing: "Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary . . . shall be presented to the President . . ."

> attempts to evade the President's veto power. The function of the Congress in our constitutional system is to enact laws, and all final congressional action of public effect, whether or not it is formally referred to as a bill, resolution, order or vote, must follow the procedures prescribed in Art. I, § 7, including presentation to the President for his approval or veto.*

Since the power to appropriate money, and to place binding limitations on the use of that money, is a quintessential legislative act, the conclusion is evident that the Presentation Clauses require amendments of funding statutes, whether achieved through a legislative disapproval mechanism or otherwise, to be presented to the President in order to have the force of law.[6]

It is well established that Congress cannot use its power to appropriate money to circumvent general constitutional limitations on congressional power. This point was well made in 1933, when Attorney General Mitchell observed, in an opinion to the President, that

> Congress holds the purse strings, and it may grant or withhold appropriations as it chooses, and when making an appropriation may direct the purposes to which the appropriation shall be devoted and impose conditions in respect to its use, provided always that the conditions do not require operation of the Government in a way forbidden by the Constitution. Congress may not, by conditions attached to appropriations, provide for a discharge of the functions of Government in a manner not authorized by the Constitution. If such a practice were permissible, Congress could subvert the Constitution. It might make appropriations on condition that the executive department abrogate its functions.[7]

The Supreme Court has since adopted the essence of Attorney General Mitchell's position. In *United States* v. *Lovett*, 328 U.S. 303 (1946), Congress had attached a condition to an appropriations bill forbidding the payment of any funds in that bill to three named individuals. Counsel for Congress argued that the provision was a

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*NOTE: The full text of the Attorney General's opinion of June 5, 1980, for the Secretary of Education appears in this volume at p. 21, *supra*, and the quoted passage at p. 24. Ed.

[6] Mr. Levitas, in support of his amendment, argued that *Kendall* v. *United States*, 37 U.S. 524 (1838), forbids the Executive Branch to refuse to execute statutory commands from Congress. *See* 126 Cong. Rec. 19,313 (1980). In *Kendall*, the Court ordered the Executive to pay a certain sum to a contractor with the Post Office, where a statute directed that the payment be made but the Postmaster General refused to pay it. We do not doubt the soundness of that case; it is, however, inapplicable to congressional action that does not meet the Constitution's prerequisites for legislation.

[7] 37 Op. Att'y Gen. 56, 61 (1933). Accordingly, the Attorney General concluded that Congress could not constitutionally condition an appropriation for refunds of erroneously collected taxes on a requirement that a joint congressional committee decide the amount of each refund to be granted.

> mere appropriation measure, and that, since Congress under the Constitution has complete control over appropriations, a challenge to the measure's constitutionality does not present a justiciable question in the courts, but is merely a political issue over which Congress has final say.

328 U.S. at 313. The Court, in rejecting the argument made by Congress' counsel, agreed with the Solicitor General's argument against the constitutionality of the appropriation rider and established the principle that the spending power may not be used indirectly to achieve an unconstitutional end. The Court reaffirmed this basic tenet in *Buckley* v. *Valeo*, 424 U.S. 1 (1976) (*per curiam*), by asserting that Congress cannot use a grant of power "in such a manner as to offend . . . constitutional restrictions stemming from the separation of powers." *Id.* at 132. The Presentation Clauses constitute an explicit limitation on the power of Congress stemming from the separation of powers, one which this amendment would unconstitutionally contravene.

The Executive's duty faithfully to execute the law embraces a duty to enforce the fundamental law set forth in the Constitution as well as a duty to enforce the law founded in the acts of Congress, and cases arise in which the duty to the one precludes the duty to the other. We believe that the present case is such a case, because the Levitas amendment intrudes upon the constitutional prerogatives of the Executive. To regard this provision as legally binding would impair the Executive's constitutional role and would constitute an abdication of the responsibility of the Executive Branch, as an equal and coordinate branch of government with the Legislative Branch, to preserve the integrity of its functions against constitutional encroachment. We therefore conclude that, if enacted, the Levitas amendment will not have any legal effect, except insofar as it is meant to deny funds for the implementation of regulations that have been subjected to a legislative veto before the bill's enactment.[8] Agencies covered by H.R. 7854 will accordingly be authorized to implement regulations that have purportedly been vetoed by congressional action that does not meet the Constitution's requisites for legislation.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

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[8] *See* note 3 *supra.*

Disclosure of Confidential Business Records Obtained Under the National Traffic and Motor Vehicle Safety Act

National Highway Traffic Safety Administration (NHTSA) is not authorized to release confidential information and trade secrets obtained pursuant to § 112 of the National Traffic and Motor Vehicle Safety Act to the Federal Trade Commission (Commission) for use in a pending investigation of possible unfair and deceptive trade practices; § 112(e) precludes disclosure to agencies other than those charged with enforcing Title I of that Act, except in accordance with 18 U.S.C. § 1905.

Under 18 U.S.C. § 1905, confidential corporate records may be released if authorized by law; in the present situation only § 8 of the Federal Trade Commission Act, which confers on the President power to authorize disclosure to the Commission of confidential business information protected by § 1905, constitutes such authority.

Executive Order No. 12,174 is designed to minimize paperwork burdens on executive agencies, and does not authorize the NHTSA to disclose information protected by § 1905; nor does § 9 of the Federal Trade Commission Act provide such authority, at least in cases where the Commission has not sought to obtain the information through a request to the President under § 8, or directly from the party under investigation.

August 15, 1980

MEMORANDUM OPINION FOR THE CHIEF COUNSEL, NATIONAL HIGHWAY TRAFFIC SAFETY ADMINISTRATION

This responds to your letter inquiring whether confidential information and trade secrets received by your agency pursuant to § 112 of the National Traffic and Motor Vehicle Safety Act (Safety Act), 15 U.S.C. § 1401, may be released by it to the Federal Trade Commission (Commission) for use by the Commission in a pending investigation of possible unfair and deceptive trade practices.

The opinion of this Office dated December 19, 1977 concluded that § 112(e) of the Safety Act precluded such a release [1] because of the specific reference in that section to 18 U.S.C. § 1905, prohibiting generally the disclosure of confidential information and trade secrets in the possession of federal agencies unless authorized by law,[2] and further concluded that the Federal Reports Act, 44 U.S.C. § 3508, was inapplicable.

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[1] Section 112(e) provides:

> (e) Except as otherwise provided in section 158(a)(2) and section 113(b) of this title, all information reported to or otherwise obtained by the Secretary or his representative pursuant to this title which information contains or relates to a trade secret or other matter referred to in section 1905 of title 18 shall be considered confidential for the purpose of that section, except that such information may be disclosed to other officers or employees concerned with carrying out this title or when relevant in any proceeding under this title. Nothing in this section shall authorize the withholding of information by the Secretary or any officer or employee under his control, from the duly authorized committees of the Congress.

15 U.S.C. § 1401(e). We discussed the special situations covered by § 113(b), 15 U.S.C. § 1402(b), and § 158(a)(2), 15 U.S.C. § 1418(a)(2) in our 1977 opinion. They do not appear to be applicable to the issues here involved.

You now have asked us to reexamine our 1977 opinion in the light of our subsequent interpretation of a different statute, *viz.*, § 505(d) of the Motor Vehicle Information and Cost Savings Act of 1972, as added by § 301 of the Energy Policy and Conservation Act of 1975, 15 U.S.C. § 2005(d),* and in light of Executive Order No. 12,174, 3 C.F.R. 462 (1979), entitled "Paperwork." Recognizing the importance of the matter, we have carefully reexamined our 1977 opinion. We are convinced of the correctness of our conclusion that trade secrets and confidential information obtained by your agency pursuant to § 112 of the Safety Act cannot be released to the Commission. We are reinforced in that view by the provisions in § 112(e), which authorize the disclosure of such information to agencies carrying out Title I of the Safety Act, thus indicating by implication that the information may not be made available to agencies that do not have those functions.

I.

An important basis for our 1977 opinion was the holding in *Morton* v. *Mancari,* 417 U.S. 535, 550–51 (1974), that in the absence of a clear intention to the contrary "a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." Section 112(e) is not only a later enactment than the Federal Reports Act,[3] but also deals with the specific issue of the disclosure of information received pursuant to Title I of the Safety Act, rather than, as does the Reports Act, with the general matter of the intragovernmental exchange of information. Section 112(e) therefore prevails over the

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[2] Section 1905 provides:

> Whoever, being an officer or employee of the United States or of any department or agency thereof, publishes, divulges, discloses, or makes known in any manner or to any extent not authorized by law any information coming to him in the course of his employment or official duties or by reason of any examination or investigation made by, or return, report or record made to or filed with, such department or agency or officer or employee thereof, which information concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association or permits any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; shall be fined not more than $1,000, or imprisoned not more than one year, or both; and shall be removed from office or employment.

*Note: An opinion of the Office dated April 27, 1978 concluded that business secrets obtained under Title V of the Motor Vehicle Information and Cost Savings Act of 1972 may generally be made available to other government agencies even though they may not be disclosed to the public. Ed.

[3] While 44 U.S.C. § 3508 was technically enacted in 1968 as the result of the codification of title 44, U.S. Code, *i.e.*, subsequent to the 1966 enactment of the Safety Act, its enactment actually dates back to the Federal Records Act of 1942, Pub. L. No. 78–192, 57 Stat. 380 (1943).

Reports Act. *Morton* v. *Mancari* has repeatedly been cited with approval in recent decisions of the Supreme Court. *See, e.g., The Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133–34 (1974); *Administrator, FAA* v. *Robertson*, 422 U.S. 255, 265–66 (1975); *United States* v. *United Continental Tuna*, 425 U.S. 164, 168–69 (1976); *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Significantly, the issue in *Robertson* is analogous to the one here presented, namely, whether the general disclosure provisions of the Freedom of Information Act, 5 U.S.C. § 552, prevail over the specific confidentiality provisions of § 1104 of the Civil Aviation Act, 49 U.S.C. § 1504 (Supp. III 1979). Two recent decisions of the Supreme Court, *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), and *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980), further indicate that a specific statutory confidentiality provision is not easily overcome.

Your letter and a letter we have received from the Commission each suggest that the confidentiality of information submitted pursuant to Title I of the Safety Act would be adequately protected even if the Reports Act were applicable because confidential information made available by one agency to another one pursuant to the Reports Act still would have to be treated as confidential by the recipient agency. The purpose of § 112(e) of the Safety Act is, however, as appears from its very language, to protect confidential information received under the Safety Act not only from the public and from competitors but also from government agencies, except those that carry out that title. The Safety Act is one of a group of statutes, called Required Report Statutes, frequently part of safety legislation, which require the reporting of possibly self-damaging information in exchange for varying degrees of confidentiality. The underlying rationale is that persons are to be encouraged accurately to report what may be incriminating information that the government otherwise could not obtain at all or only with much delay or difficulty, in exchange for a promise that the information will not be disclosed freely. *See, e.g.*, 2 J. Weinstein 8 M. Berger, *Weinstein's Evidence*, ¶ 502[02] (1979); *The Required Report Privileges*, 56 Nw. U.L. Rev. 283, 286 (1961); 8 J. Wigmore, Evidence in Trials at Common Law, § 2377(f) (J. McNaughton Rev. 1961)).

Those who report confidential information to agencies dealing essentially with safety considerations are concerned not only with disclosures to the public at large or to their competitors. They also fear, possibly even more so, the disclosure of that information to regulatory or law-enforcing agencies. Thus, after the Supreme Court held in *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 215–220, (1961), that the Federal Trade Commission could subpoena the retained copies of census reports, the response of at least some firms to census surveys deteriorated with a corresponding reduction of the accuracy of census statistics. *See* Report of the Secretary of Commerce to the President, dated July 24, 1962, *reprinted in* S. Rep. 2218, 87th Cong., 2d Sess. p. 2-3 (1962).[4] Similarly, it may be anticipated that firms will be less willing to submit correct and complete information under the Safety Act if they must expect that this information will be shared with agencies such as the Commission, even if it will be withheld from the general public and from competitors. Accordingly, it is our view that a routine disclosure within the government—even if to the exclusion of the public at large—of information received pursuant to Title I of the Safety Act would be contrary to the statutory intent and contrary to the purposes that this Required Report Statute was designed to achieve.

II.

The intended disclosure of the information to the Commission is thus governed by 18 U.S.C. § 1905.[5] That section does not absolutely prohibit the publication of confidential business information and trade secrets but only the disclosure of information to the extent "not authorized by law." The phrase "authorized by law" does not mean that the authorization must be "specifically authorized by a law"; it is sufficient that the disclosure is "authorized in a general way by law." 41 Op. Att'y Gen. 166, 169 (1953).

The following have been recognized as lawful sources of disclosure authority under § 1905 or its predecessors: subpoenas, *Blair* v. *Oesterlein Co.*, 275 U.S. 220, 227 (1927), *United States* v. *Liebert*, 519 F.2d 542, 546 (3rd Cir. 1975), *cert. denied*, 423 U.S. 985 (1975); requests of congressional committees acting within the limits of their jurisdiction and authority, 41 Op. Att'y Gen. 221, 226–28 (1955); regulations, provided that the authority on which the regulation is based includes the power to waive the confidentiality provisions of 18 U.S.C. § 1905, *cf. Chrysler Corp.* v. *Brown*, 441 U.S. at 294–316 (1975); or implication. Accordingly, the power to liquidate a government-owned financial institution has been held to carry with it the authority to disclose to potential purchasers of its assets confidential financial data submitted by its borrowers. 41 Op. Att'y Gen. 166 (1953).

We turn now to examine the three possible sources of "authority" pursuant to which your Agency may turn confidential business information over to the Commission. They are: (1) Executive Order No. 12,174 of November 30, 1979, 3 C.F.R. 462 (1979), designed to minimize federal paperwork burdens; (2) § 8 of the Federal Trade Commission Act, 15 U.S.C. § 48, pursuant to which the President may direct the several departments and bureaus of the government to furnish to the

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[4] Congress thereupon amended 13 U.S.C. § 9(a) so as to render the retained copies of census reports immune from agency demands and legal processes. Act of October 15, 1962, Pub. L. No. 87-813, 76 Stat. 922.

[5] The two exceptions of § 112(e), namely, disclosure to Congress or to another agency carrying out Title I of the Safety Act, are not applicable here.

Commission on its request all records, papers, and information in their possession; and (3) § 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, which confers subpoena power on the Commission.

1. Your letter suggests that the disclosure of confidential business information and trade secrets by your agency would be "authorized" by Executive Order No. 12,174, because that order, presumably § 1-106[a], "establishes a system for sharing information among federal agencies to eliminate duplication of information requests."[6] The language of § 1-106[a] does not on its face purport to require, or even permit, the sharing of information among federal agencies where disclosure is prohibited by statute. To the contrary, the second sentence of § 1-107 provides that the "Order shall be implemented in a manner consistent with all applicable Federal statutes." *Id.* Hence, the executive order shows by its own terms that it is not intended to constitute a "lawful authority" within the meaning of 18 U.S.C. § 1905. In these circumstances, it does not become necessary to go into the delicate question whether the President's general nonstatutory authority over the federal establishment would support an executive order authorizing or directing the disclosure of information which by statute is required to be kept confidential. As a rule, this general nonstatutory executive power cannot legalize action that is prohibited by law. *See, e.g., Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 635-38 (1952) (Jackson, J. concurring); *United States* v. *Tingey,* 30 U.S. (5 Pet.) 115, 129 (1831); *United States* v. *MacDaniel,* 32 U.S. (7 Pet.) 1, 14-15 (1833). *Chrysler Corp.* v. *Brown,* 441 U.S. at 310-12 (1979), indicates that the prohibition of 18 U.S.C. § 1905 cannot be overcome by the exercise of a housekeeping authority.

In this connection your letter suggests that the Commission could obtain information identical to that in the possession of your agency by subpoenaing it directly from General Motors under § 9 of the Federal Trade Commission Act, 15 U.S.C. § 49. An interpretation of the law requiring your agency to withhold the information from the Commission therefore would result, in your view, in a needless duplication of effort in violation of the policy of the executive order and of the Federal Reports Act. This analysis overlooks the important factor that a subpoena under § 9 is subject to judicial review. For all we know a corporation the size of General Motors furnishing information to your agency is far more concerned with the availability of judicial review of a § 9 subpoena, than with the mechanical burden of having to duplicate the reports submitted to your agency.[7] Proceeding by a § 9 subpoena rather than by an undisclosed intra-agency release of the documents therefore would not constitute a needless duplicative procedure but one which may prove to be of considerable value to General Motors. Of course, if General Motors wants to avoid the burden of having to duplicate the materials and has no objection to their release to the Commission, it can request your agency to turn the information over to the Commission. Such a request would unquestionably constitute an authority within the meaning of § 1905.

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[6] Section 1-106 provides, in pertinent part:

> 1-106. The Director [Office of Management and Budget] shall audit compliance with this Order and may issue rules and regulations necessary to implement it. The Director may issue exemptions for agencies whose use of forms is limited. The Director also shall:
>
> [a] Seek to eliminate duplication in requests for information by establishing a Federal information locator system, which will list all the types of information collected by Federal agencies and will be available for use by all agencies. This or similar systems will not contain any information obtained from the public. The Director shall take any other steps needed to prevent duplication, including the assignment to a particular agency of lead responsibility for the collection of certain types of information.

3 C.F.R. 462, 463 (1979).

2. Section 8 of the Federal Trade Commission Act provides:

> The several departments and bureaus of the Government when directed by the President shall furnish the Commission, upon its request, all records, papers, and information in their possession relating to any corporation subject to any of the provisions of this subchapter . . . .

15 U.S.C. § 48.

Your letter suggests that your agency could release information to the Commission even without a presidential directive, because insistence on such "directive would impose an unnecessary burden on the Government." The legislative history of § 8, however, indicates that, although the section does confer on the president the power to authorize the disclosure of confidential business information within the meaning of 18 U.S.C. § 1905, presidential action is not an idle formality but an indispensable prerequisite for such release.

During the debates on the Federal Trade Commission Act in the House of Representatives, Congressman Mann inquired whether and to what extent confidential corporate records in the possession of a government agency would be furnished to the Commission under § 8. Congressman Covington, the sponsor of the bill, explained:

> MR. COVINGTON. I think that is quite true. Those returns ought not to be furnished except, perhaps, in an extremely urgent case. The first draft of this section, as prepared by the committee, did not have in it the qualifying clause "when directed by the President." In the first draft of the section the provision as inserted was the same as the provision for the same purpose contained in the law creating the so-called Handley Commission. That contained one of the broadest powers that has ever been

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[7] According to the preamble, and § 1-103 of the executive order, the order is designed to minimize the paperwork burden on the public, "in particular, individuals and small organizations." 3 C.F.R. 462 (1979).

> conferred upon a commission to obtain from any of the bureaus or departments of the Government any information which it desired.
>
> MR. MANN. That is very true, but that was before the income-tax law was in effect.
>
> MR. COVINGTON. If the gentleman will hear me through. We then determined, however, that by limiting the authority to turn over such information by direction of the President, all the safeguards that ought to surround any class of information would be in the possession of the Government.

51 Cong. Rec. 9045 (1914).[8] Accordingly, § 8 does constitute an "authority" for the release of confidential business information and trade secrets, but only after the President has determined the need for the release of such information and directed that it be furnished to the Commission.[9]

3. Section 9 of the Federal Trade Commission Act, 15 U.S.C. § 49, confers subpoena power on the Commission. It has been construed as not limited to parties to proceedings before the Commission or to persons under investigation by it, but as extending also to witnesses or other third parties who have custody of pertinent documentary evidence. *Federal Trade Commission* v. *Tuttle,* 244 F.2d 605, 611–16 (2d Cir. 1957), *cert. denied,* 354 U.S. 925 (1957); *Federal Trade Commission* v. *Cockrell,* 431 F. Supp. 561, 563 (D.D.C. 1977). The question, therefore, is whether the Commission could subpoena from your agency information received by it under Title I of the Safety Act and whether a release of the information pursuant to the subpoena would be "authorized by law" within the meaning of 18 U.S.C. § 1905. On this question there is an area of disagreement between the Department of Justice and the Commission. We take the position that since § 8 of the Federal Trade Commission Act is the specific procedure pursuant to which the Commission can obtain records, papers, and information in the possession of the government agencies, it is also the exclusive one;[10] and that an interpretation of § 9 giving the Commission power to subpoena government agencies, would undermine the President's responsibility, specifically conferred on him by § 8, to determine the situations in which the confidentiality of government documents may be waived. In a recent interlocutory order issued in *In re Exxon Corp. et al.,* 95 F.T.C. 919 (1980), the Commission has taken the position, that,

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[8] There was no corresponding discussion in the Senate debate because the Senate version of the Federal Trade Commission legislation did not have an equivalent to § 8.

[9] The remote possibility that the President might direct a disclosure of confidential information pursuant to § 8 is not likely to affect the cooperation of corporations with your agency. *See United States* v. *Nixon,* 418 U.S. § 683, 711–713 (1974).

[10] *See, e.g., National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers,* 414 U.S. 453, 458 (1974).

in view of its status as an independent agency, its power to obtain information cannot be frustrated by the President's refusal to make information available to it under § 8. Nevertheless, the Commission's order indicates that, as against an agency in the executive branch, the Commission will exercise its subpoena power under § 9 only after it has proceeded unsuccessfully under § 8 and then only in the most compelling circumstances, especially if the information cannot be reasonably obtained by other means. In the situation at hand, the information is subject to subpoena directed to the party under investigation. Hence, under the Commission's own interpretation of the law, it could not direct a subpoena to your agency for the data in its possession.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

Applicability of the Federal Advisory Committee Act to the National Endowment for the Humanities

The Federal Advisory Committee Act (FACA) requires that the names of members of the Humanities Panel of the National Endowment for the Humanities (NEH) be made available to the public by subgroup, but does not require that such disclosure occur until after the particular subgroup's work has been completed.

The privacy exemption to the open meeting requirement of the Government in the Sunshine Act, made applicable to federal advisory committees by the 1976 amendments to FACA, may permit closing some portions of meetings of subgroups of the Humanities Panel at which individual grant applications are discussed; however, the NEH has the responsibility to determine in advance what portions of subgroup meetings will not fall within an exemption to FACA's openness requirement, and to assure that those portions are closed to the public.

August 18, 1980

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, NATIONAL ENDOWMENT FOR THE HUMANITIES

This responds to your request for our advice regarding the Federal Advisory Committee Act (FACA).[1] This memorandum focuses on two issues: first, whether the FACA requires that the names of members of National Endowment for the Humanities (NEH) advisory committees and their subgroups be made available to the public, and if so, at what time; and second, whether the meetings of such committees could, in appropriate circumstances, be closed to the public in order to protect the privacy interests of applicants for financial assistance. We will discuss each issue in turn after setting forth the relevant facts.

I. Background

The NEH has two advisory committees. The first is the National Council on the Humanities, created pursuant to § 8 of the National Foundation on the Arts and Humanities Act, Pub. L. No. 89-209, 79 Stat. 845 (1965), as codified at 20 U.S.C. § 957. The National Council advises the chairman regarding the Endowment's policies and procedures and regarding applications for financial assistance. The second advisory committee is the Humanities Panel, created by NEH and composed of hundreds of scholars and experts in various fields who meet in subgroups or panels to review and make recommendations regarding applications for financial assistance.[2]

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[1] Pub. L. No. 92-463, 86 Stat. 770 (1972), as amended by Pub. L. No. 94-409, § 5(c), 90 Stat. 1247 (1976). The FACA is codified in 5 U.S.C. App.

Our understanding is that the NEH publishes the names of all Humanities Panel members without differentiating among the various subgroups. Also, we understand that when applicants seek information about their applications, the NEH may release to them the names of members of the reviewing panel, but only after the chairman has taken final action on applications considered by the panel.

We understand further that, as a rule, the NEH opens to the public those portions of National Council meetings at which the NEH's general policies, procedures, and practices are discussed. Portions of meetings of the National Council and the subgroups of the Humanities Panel that review applications for financial assistance, we understand, generally are *not* open to the public.

II. Discussion

1. Membership of Advisory Committees

You have asked us whether the NEH's policies regarding disclosure of the names of members of the Humanities Panel are in accord with the FACA. This raises two subsidiary issues. First, does the FACA require the NEH to make available to the public not only the names of all of the members of the Humanities Panel, but also the names of the members of specific subgroups of the Panel that consider applications for financial assistance? Second, if there is any such requirement, at what point in the process should the NEH make these names public—at once, or after the subgroups have completed their work?

Although the FACA does not address these issues in specific terms, answers may be inferred from its associated requirements. First, the FACA does require the President annually to report to Congress on the activities and status of advisory committees. Among the items to be included in such reports is a list of "the names and occupations of . . . current members" of advisory committees. § 6(c). Although there is no similar requirement that the public be informed of the names of members of advisory committees, because Congress decreed that one of the purposes of the FACA was that "the Congress *and the public* should be kept informed with respect to the . . . membership . . . of advisory committees," § 2(b)(5) (emphasis added), the Act, in our view, contemplates that the names of members of advisory committees should also be made available to the public.[3]

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[2] The word "panel" without capitalization refers to a subgroup of the larger Humanities Panel. The Humanities Panel comprises *all* who may potentially serve on subgroups or panels. The Humanities Panel numbers in the hundreds, while individual panels are composed of a few chosen experts.

[3] This inference is buttressed by the fact that the FACA requires that the membership of advisory committees be "balanced" in terms of the points of view represented on them. *See* §§ 5(b)(2) and (c). There would be no way for the public to monitor agency compliance with this requirement if the public were not able to know the identity of the membership of advisory committees.

Thus, the issue arises whether the NEH's policy of disclosing publicly the names of all members of the Humanities Panel is in compliance with the Act. Although there is no provision specifically rendering invalid such a practice, we believe that it would be more in keeping with the provisions and spirit of the FACA for the NEH to make available to the public the names of members of subgroups of the Humanities Panel as well as the names of members of the Humanities Panel as a whole. The reason for this is that the FACA expressly defines an "advisory committee" to include not only any committee, board, commission, council, conference, panel, task force, or other similar group, but also "any subcommittee or other subgroup thereof . . .", § 3(2), that otherwise meets the tests of an advisory body. Accordingly, subgroups of the Humanities Panel are advisory committees in their own right. For the public to be fully informed about the membership of each NEH advisory committee, therefore, the public should have access to information about the membership not only of the Humanities Panel as a whole, but also of each of its subgroups that functions independently as an advisory committee.[4]

The second question is whether the FACA requires that such disclosure occur at once—or at least as soon as or shortly after the subgroups of the Humanities Panel are constituted—or whether such disclosure may occur later in the process after the subgroups have completed their work and agency action on the applications has been taken. We find no requirements in the FACA that the NEH must make such disclosure at once or at any time before the subgroups have completed their work and the agency has taken action on the applications. Had Congress intended to impose such a requirement, it could easily have done so, such as in the provisions detailing the contents of charters to be filed before advisory committees may be established, *see* § 9(c), or of the notices of advisory committee meetings, *see* §10(a). These provisions are silent on the subject. Similarly, OMB Circular A-63 (Mar. 27, 1974), as amended, which implements the FACA and provides more detailed procedural guidance than the Act itself, does not require the NEH to disclose the membership of its Humanities Panel subgroups at any particular time. Indeed, the only provision of the FACA that speaks specifically about identifying the members of advisory committees (aside from the one discussed above dealing with annual reports to Congress) concerns the required contents of the minutes of advisory committee meetings,[5] which are, of their very nature, only made available to the public, if at all, after the work of committees has been completed. Since *both* situations in which Congress specifically requires disclosure of the names of committee members, or at least of those present at meetings, are ones that would lead to public disclosure, if ever, only after advisory committee meetings have been completed, we consider that the Act cannot fairly be read to impose any more stringent requirement in this case.

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[4] Without addressing in any detail the various ways in which such information could be made available to the public, we should note that such methods might include placing lists of the members of subgroups of the Humanities Panel in a file open to the public, or including such information in reports about the activities of NEH advisory committees. *Cf.* § 8.b(5) of the proposed joint Department of Justice-OMB guidelines on the FACA, published in 1973 at 38 Fed. Reg. 2308 (Jan. 23, 1973) (calling on agencies annually to prepare a report describing the membership, functions, and actions of its advisory committees; this proposed order was superseded by OMB Circular A-63, which contains no such specific requirement that advisory committee membership be annually reported).

2. Closing Advisory Committee Meetings

You have asked whether the NEH could invoke, as the basis for closing meetings at which applications for financial assistance are reviewed, the sixth of the applicable Government in the Sunshine Act exemptions from the open meeting requirement. *See* 5 U.S.C. § 552b(c)(6). The exemption pertains to information likely to:

> . . . disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy . . . .

With the *caveats* noted below, our answer is yes.[6]

As a preliminary matter, the FACA's legislative history makes plain that the Act's "standard of openness . . . is to be liberally construed." S. Rep. No. 1098, 92d Cong., 2d Sess. 14 (1972); *see also* H.R. Rep. No. 1017, 92d Cong., 2d Sess. (1972); H.R. Conf. Rep. No. 1403, 92d Cong., 2d Sess. (1972). Courts have underscored that ". . . when a federal executive official utilizes an advisory committee to assist him in discharging his responsibilities, in most instances he must do so openly and publicly." *Center for Auto Safety* v. *Cox*, 580 F. 2d 689, 694 (D.C. Cir. 1978); *see also Food Chemical News, Inc.* v. *Davis*, 378 F. Supp. 1048, 1051 (D.D.C. 1974). Further, one of the main reasons for the 1976 amendment of the FACA making the Sunshine Act's (instead of the FOIA's) exemptions from the open-meeting requirement applicable to advisory committees was to eliminate FOIA exemption (b)(5)[7] as a basis for closing advisory committee meetings. As the conference report underscored, the amendment was intended ". . . to end agency reliance upon the 'full and frank' discussion rationale for closing advisory committee meetings." H.R. Rep. No. 1441, 94th Cong., 2d Sess. 26 (1976). Thus, to invoke a Sunshine Act exemption, a more specific justification must be found to exist than merely a generalized need to protect candor in advisory committee deliberations.

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[5] *See* § 10(c) of the FACA, which requires that advisory committee minutes include, *inter alia*, "a record of the persons present . . . ."

[6] We do not discuss here the procedural steps that must be taken before the NEH may close an advisory committee meeting. *See* OMB Circular A-63.

[7] That exemption pertains to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency."

The privacy exemption to the open meeting requirement calls for an assessment whether the topic of discussion is of a "personal" or private nature and, second, whether in the particular case the topic is so personal that its disclosure would be a "clearly unwarranted" invasion of an individual's privacy interests. The latter determination requires a weighing of the interests in privacy against the interests in disclosure. *See* H.R. Rep. No. 880, Pt. I, 94th Cong., 2d Sess. 11 (1976); *see also* Note, *The Government in the Sunshine Act—an Overview*, 1977 Duke L.J. 565, 577–78.[8]

The subjects to be discussed with respect to applications for financial assistance could well include, for example, an applicant's abilities in his field, his reputation among his colleagues, and his professional background and performance. These topics would certainly appear to involve the type of personal information in which an applicant has a privacy interest. Support for that view derives from S. Rep. No. 354, 94th Cong., 1st Sess. 21 (1975), which states that the forerunner to this exemption "may" apply to "a discussion of an individual's drinking habits or health, *or review of a grant application which requires assessing an individual's professional competence*" (emphasis added). The House Government Operations Committee report notes that the exemption would apply, for instance, to discussions of an individual's health or alleged drinking habits. *See* H.R. Rep. No. 880, Pt. I, 94th Cong., 2d Sess. 11 (1976). It seems plain that just as discussing a person's health could reveal highly personal matters as to which an individual has a strong privacy interest, so too could discussing a scholar's competence, a researcher's reputation, or an applicant's ability to carry through a project that he starts—which, again, are precisely the types of matters that may be crucial in reviewing applications for financial assistance. *Cf. Washington Research Project, Inc.* v. *Dept. of HEW*, 366 F. Supp. 929, 937 (D.D.C. 1973), *aff'd on other grounds*, 504 F.2d 238 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

But the fact that an applicant has a legitimate privacy interest in a closed committee meeting does not end the inquiry. The agency must also determine that the privacy interest is not *de minimis* and is not outweighed by countervailing interests in openness.[9]

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[8] The balancing analysis required under the Sunshine Act's privacy exemption, 5 U.S.C. § 552b(c)(6), is essentially similar to that required under the privacy exemption of the Freedom of Information Act, 5 U.S.C. § 552(b)(6) except that the latter, dealing with records involves the additional issue whether a document is the type of "file" covered by the exemption. *See generally* S. Rep. No. 354, 94th Cong., 1st Sess. 3 (1975); H.R. Rep. No. 880, Pt. I, 94th Cong., 2d Sess. 15 (1976); Marblestone, *The Relationship Between the Government in the Sunshine Act and the Federal Advisory Committee Act*, 36 Fed. Bar J. 65, 67 and n. 16 (1977).

[9] The legislative history of the amendment of the FACA making the Sunshine Act's exemptions applicable to advisory committee meetings indicates Congress' acceptance of the principle that "peer review" processes may have to be closed to protect legitimate privacy interests, although the competing interest in openness must be weighed against the privacy interests. *See* H.R. Conf. Rep. No. 1441, 94th Cong., 2d Sess. 26 (1976): "The conferees . . . are concerned about the possible effect of this amendment upon the peer review and clinical trial preliminary review systems of the National

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In the present context, for instance, it might be known in advance that an NEH advisory committee will consider as factors in the award of assistance such subjects as the geographical location of academic institutions with which applicants are affiliated. If this were known, the agency would be under an obligation to consider whether such a discussion could be isolated from other subjects of a more personal nature. If it could be, the NEH should open to the public such portions of committee deliberations that do not seriously implicate applicants' interests in protecting from public view intimate facts about themselves. Opening such portions of committee meetings would serve the same important aim of allowing the public to be informed about criteria for awarding financial assistance as is served by opening the National Council's policy discussions, which, we understand, already is done. There is no more justification for closing to the public such discussions when they occur in subgroups of the Humanities Panel than there is when they occur in the National Council.

At the same time, we recognize that in the advisory committee context, and particularly when dealing with the review of individuals' applications for financial assistance, it may be difficult if not impossible to segregate in advance all of the policy-oriented, nonprivate topics from the particularized, highly private subjects. This may be so simply because, in a meeting, tight controls on the development of discussion are difficult to impose. For instance, in policy discussions that are open to the public, committee members may wish on occasion to comment on highly private matters pertaining to applicants. Conversely, in nonpublic discussions of applications subject to the privacy exemption, members may raise topics implicating no real privacy concerns. While these observations militate against an inflexible or impractical rule in this context, it should nonetheless be borne in mind that under the FACA, the NEH has the responsibility to seek in advance to determine what portions of advisory committee meetings will not fall within the specified exemptions from the openness requirement, and to ensure that those portions are not closed to the public.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

Institutes of Health. The conferees thus wish to state as clearly as possible that personal data, such as individual medical information, is especially sensitive and should be given appropriate protection to prevent clearly unwarranted invasions of individual privacy. While the conferees are sympathetic to the concerns expressed by NIH . . . , the conferees are equally sympathetic to concerns expressed by citizens' groups that important fiscal and health-related information not be unnecessarily withheld from the public." *See also* H.R. Rep. No. 880, Pt. II, 94th Cong., 2d Sess. 11 (1976); Note, *Government in the Sunshine Act: Opening Federal Agency Meetings*, 26 Am.U.L.Rev. 154, 182–83 (1976). *Cf. Ditlow* v. *Shultz*, 517 F.2d 166, 169–170 (D.C. Cir. 1975) (speaking of the privacy interests protected by the FOIA, which include, *inter alia*, matters of reputation, and which must be balanced against interests in disclosure).

Representation of White House Employees

[The following memorandum opinion discusses the propriety, under applicable laws and regulations, of providing legal representation at government expense to White House employees in connection with pending investigations by the Justice Department's Office of Professional Responsibility and the Senate Judiciary Committee. Its conclusions are summarized in its second paragraph.]

August 27, 1980

MEMORANDUM OPINION FOR
THE COUNSEL TO THE PRESIDENT

This responds to the request from the Deputy Counsel to the President for our views concerning the propriety of providing legal representation for White House employees who are questioned by either the Justice Department's Office of Professional Responsibility (OPR), or the Senate Judiciary Committee in connection with the investigations presently underway into the relationship and activities of the President's brother, Billy Carter, with respect to the government of Libya. We recognize that timely advice on this question is of the essence, since the OPR and Senate investigations are currently in progress. Accordingly, we have briefly described our conclusions in this memorandum, and where available, we have attached supporting materials that were prepared in connection with other inquiries.

Our conclusions can be summarized as follows:

(1) White House employees should be discouraged from accepting offers of free or discounted professional service from private lawyers because of the appearance that the service has been offered because of their employment at the White House, and because of the limitations imposed by 3 C.F.R. 100.735-14 (1980).

(2) *OPR Investigation:* No government attorney, and no private attorney retained at government expense may represent White House employees in connection with the OPR investigation. Employees may choose to retain counsel at their own expense to represent their individual interests before OPR.

(3) *Senate Investigation:* No government attorney, and no private attorney retained at government expense may represent the *personal interests* of White House employees in connection with the Senate investigation. Employees may choose to retain private counsel to represent their personal interest before the Senate Committee.

(4) A government attorney may and should represent *governmental interests* in connection with the questioning of White House employees by the Senate Committee. A government attorney may be "detailed" from an agency which otherwise has no involvement in the matter under investigation, or a private attorney may be retained by the White House as a special government employee to perform this function.

(5) Private counsel retained by employees may not represent governmental interests before OPR or the Senate Committee.

A prefatory summary of the pertinent background facts is useful in order to place the representation issues raised by your opinion request in a proper context. Two investigations are pending at this time: (1) an investigation undertaken by this Department's Office of Professional Responsibility pursuant to a special direction from the Acting Attorney General focused on whether any employee of this Department, the White House, or any other person is chargeable with criminal, civil, or administrative wrongdoing growing out of the Administration's activities concerning Billy Carter's contacts with Libya, 45 Fed. Reg. 52,946–47 (1980); and (2) an investigation conducted by a subcommittee of the Senate Judiciary Committee which presumably will focus on the legislative consequences, if any, of the matter, rather than on governmental sanctions. *See generally* 126 Cong. Rec. 19,544–46 (1980). You have advised us that both investigations are now consuming the time of White House employees, and that several have inquired whether they are entitled to legal representation by the government in responding to either investigation. You have also informed us that, pursuant to an agreement with the Senate committee, your Office has agreed not to represent any employee involved in the Senate's investigation, presumably to avoid even the appearance of collusion or other wrongdoing. There remain, then, several possible sources of representation, including Justice Department lawyers, detailees from other departments to the White House, special government employees, private counsel retained under the Justice Department's Representation Guidelines, or donated legal services. We will address first the acceptance of legal services donated by private counsel.[1]

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[1] We recognize that it will be necessary for some White House employees to spend considerable time gathering and assembling materials in response to the OPR and Senate inquiries. We view this as

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Donation of Legal Services. The acceptance of free or discounted legal services is within the parameters of the White House Standards of Conduct dealing with gifts, entertainment, and favors. 3 C.F.R. 100.735-14 (1980). Subsection (a) of this regulation prohibits the acceptance of anything of monetary value from a person (defined to include a firm) who:

> (1) Has, or is seeking to obtain, contractual or other business or financial relations with his agency;
>
> (2) Conducts operations or activities which are regulated by his agency; or
>
> (3) Has interests which may be substantially affected by the performance or nonperformance of his official duty.

The text of subsection (b) of the regulation would appear to permit the acceptance of gifts prohibited by the above criteria if the gift is given by a friend or close relative when the circumstances make it clear that the personal relationship involved is the motivating factor. However, in light of the more general requirement to avoid appearances of impropriety (*see* 3 C.F.R. 100.735-4) (1980), we would caution against the acceptance of donated legal services from any law firm which has or is likely to do business with the Government, or from any firm which may appear to have offered the services because of the employee's White House employment.

Representation before OPR. This Office has long held the view that the Government may not participate on both sides of a federal criminal investigation. The attached memoranda explain in some detail the basis for our conclusion that executive agencies lack the authority to provide counsel for employees in federal criminal matters.

The opinions of the Comptroller General support our conclusion, although they do not address the precise question of representation in a federal criminal matter. In determining whether particular expenses were "necessary" as that term is used in various appropriation acts, the Comptroller General has consistently distinguished between governmental interests and personal interests, concluding that expenditures were only authorized to the extent that they serve governmental interests. *See, e.g.,* 54 Comp. Gen. 1075 (1975) (television set); 54 Comp. Gen. 976 (1975) (gifts to seminar attendees); 47 Comp. Gen. 657 (1968) (coffee equipment). The Comptroller General reiterated the importance of this distinction between personal and governmental interests in an opinion dealing with the retention of private counsel to defend federal judicial officers in instances where Justice Department representation is unavailable. 53 Comp. Gen. 301 (1973). Although the opinion does not

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a proper governmental function which may be performed by government employees, be they lawyers or non-lawyers. However, your inquiry seems to be directed at the more traditional role of lawyers as personal representatives and advocates for a particular client. It is this latter role that we will address in this memorandum.

address the question of representation in a federal criminal matter, it does find limited authority for the payment of counsel. However, one clear limitation stated in the opinion is that appropriated funds are to be used:

> only to the extent necessary to protect the judiciary's interest in the outcome of the subject litigation, rather than the judicial officer's personal interest in having his decision upheld, and that such funds are not used, in effect, merely to defend a private litigant's position where, as is the case in most appeals of judicial rulings, the judiciary and the United States have no real interest in the outcome of the appeal.

53 Comp. Gen. at 306.[2] The opinion also notes that Justice Department representation should be sought as an initial matter and would be available in many cases. However, the opinion recognizes that private counsel may be necessary when there are conflicts presented by Justice Department representation, as in the case of a mandamus action brought by the Attorney General.

In a more recent decision, 58 Comp. Gen. 613 (1979), the Comptroller General held that the SEC could not reimburse employees for legal fees incurred as a result of its own misconduct investigation, despite the fact that the initial charges were made by a private party and the investigation was ultimately resolved in favor of the employees. The Comptroller General explained his reasoning as follows:

> Under these circumstances, the cost of providing counsel may not be considered a proper expenditure of appropriated funds. Upon SEC's determination that the matter should be further investigated with respect to three of the SEC employees, the situation was no longer one in which the Government's interest was aligned with the interests of the three employees against charges pressed by a third party, and thus it was no longer in the Government's interest to provide them with legal counsel. The SEC hearing was a formal agency fact-finding inquiry to determine whether its employees were guilty of misconduct. In fact, at that point, the situation was indistinguishable from that in which an agency itself initiates an investigation into the conduct of its own employees. That the employees were ultimately vindicated does not change the character of the proceeding.

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[2] Another explicit prerequisite set by the Comptroller General in this opinion was that the Administrative Office of the U.S. Courts "advise fully the appropriate legislative and appropriations committees of the Congress of your plans and the estimated cost thereof." 53 Comp. Gen. at 306.

58 Comp. Gen. at 618. Read together, the Comptroller General's decisions regarding representation of judicial and SEC employees support a conclusion that, absent express congressional authorization, counsel may not be provided to defend executive branch employees in an investigation or proceeding being pursued within the executive branch.

Since the direction to the Counsel on Professional Responsibility leaves no room for doubt that the OPR inquiry has potential criminal ramifications, that conclusion controls with respect to the OPR inquiry. Moreover, even absent the criminal ramifications, the same considerations would preclude providing representation for employees in connection with an investigation of wrongdoing that may result only in some form of administrative or civil sanction by the Government (such as a fine, reprimand, or discharge). Therefore, it is our conclusion that no representation at federal expense is permissible in responding to the OPR investigation. Of course, employees may retain counsel to represent their personal interests at their own expense.[3]

Representation in the Congressional Inquiry. Representation before the Senate committee is a more complicated problem. It is important first to distinguish between the representation of the personal interests of employees, and the representation of official governmental interests, because we believe that in this case the Government may provide counsel to represent governmental but not personal interests. The distinction between official and individual interests is made frequently in connection with the representation of employees in litigation, and the Justice Department's Representation Guidelines* anticipate that this distinction will be made in connection with the representation of employees before Congress. As we noted earlier, this distinction is also made by the Comptroller General in determining the availability of appropriated funds to cover a particular expense.

Although we recognize that the official and personal interests of employees may overlap to a large extent, there are also interests which are purely personal or entirely governmental. For example, the interests in avoiding federal criminal prosecution, civil liability to the United States or adverse administrative action by a federal agency are clearly personal rather than governmental interests. On the other hand, the interests in asserting a governmental privilege or defending official policies and procedures are governmental interests. The interests in presenting information correctly and clearly are both personal and governmental.

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[3] We have not precluded the possibility of counsel to represent direct governmental interests which may arise in connection with the OPR investigation. If such governmental interests arise, they may be represented. We have described this possibility and the mechanics of such representation in connection with the congressional inquiry.

*NOTE: The Justice Department Representation Guidelines referred to in the text were published in the Code of Federal Regulations in substantially unchanged form in 1982. 28 C.F.R. § 50.15 (1982). Ed.

The personal interests of employees in regard to the congressional investigation tend to parallel the purposes of the OPR investigation. Generally, it will serve the personal interests of employees to avoid making statements to the Senate that would result in adverse criminal, civil, or administrative action by OPR. As discussed above, there is no existing statutory authority for the executive branch to protect these personal interests through the provision of counsel. To the extent that these interests are implicated by the Senate investigation, we think that it would be inappropriate for the Government to provide counsel to represent them.[4]

However, there are also legitimate governmental interests which arise whenever executive branch employees are called to testify before the Congress. Ordinarily, these interests are monitored by agency counsel who accompany executive branch employees called to testify before congressional committees. We do not believe that your acquiescence in the Senate committee's demand not to serve as counsel should preclude all representation of governmental interests in connection with the Senate investigation. We have previously concluded that it would be proper to "detail" government attorneys to the White House to provide legal services in connection with the Watergate investigation so long as the lawyer's employing agency did not have conflicting responsibilities in the case. On this basis, an attorney from any agency which is not involved in the Billy Carter matter could be "detailed" to the White House to represent governmental interests in connection with the Senate investigation. We also see no reason why the White House may not retain a lawyer from a private firm as a special government employee to perform this function, since the 1980 White House appropriation leaves ample discretion to hire counsel for this purpose. Executive Office Appropriations Act, Pub. L. No. 96-74, 93 Stat. 563 (1980).[5] The alternatives of detailed or retained counsel should respond to the legitimate concerns of the Senate investigators, without undermining your responsibility to protect legitimate governmental interests in this matter.

In our view, any counsel directed to represent governmental interests must be controlled by the Government, and private counsel retained by employees to represent personal interests should not be permitted to assert governmental interests or privileges. Although it can become difficult to distinguish between personal and governmental interests, this point is one of considerable importance. Any employee detailed by the Government to serve as counsel in this matter, first, must clearly understand that he is the Government's lawyer and not private counsel for the represented employee, and, second, that he reports to and is responsible to the Government. We cannot foresee all of the particular ways in which this distinction will apply, but care must be taken throughout the course of any representation to assure that the interests of the Government control the decisions that are made.

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[4] The attached Department of Justice Representation Guidelines do appear to contemplate cases in which it would be proper for this Department to provide representation to employees called before congressional committees "in their individual capacities." *See* 28 C.F.R. § 50.15(a) (1982). Heretofore, this section has become operable when a present or former federal employee has been a defendant in a private civil suit and has simultaneously been called as a witness before a congressional committee. In such a case, the retention of counsel may be necessary to protect the employee from providing testimony that would unnecessarily compromise the defense of the civil case.

[5] Technically, representation of this limited nature might be provided by this Department, but in light of the potential for conflicts—or at least the appearance thereof—we doubt that such representation should be considered.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

Settlement Authority of the United States in Oil Shale Cases

The Attorney General has authority to settle cases even when the agency charged with administering the underlying law would not have that authority.

In settling a case, the Attorney General is not bound by whatever litigating position the Department of Justice has heretofore taken in the case, nor is he bound by each and every statutory requirement that Congress may have imposed upon some other agency head in administering that agency's program; at the same time, there may be some forms of settlement that would be foreclosed, as where the settlement would result in action plainly at variance with Congress' intent.

September 4, 1980

MEMORANDUM OPINION FOR THE DEPUTY ASSISTANT ATTORNEY GENERAL, LAND AND NATURAL RESOURCES DIVISION

This is in response to your memorandum inquiring whether "the United States has authority to settle the outstanding oil shale litigation." For the reasons set forth below, our reply is that the Attorney General, representing the United States, has such authority, but that his exercise of it must be done with close attention to the specific statutes governing the activities that form the subject matter of the litigation.

As the ranking legal official of the federal government, the Attorney General has plenary power and supervision over any litigation to which the United States is a party, absent an applicable congressional directive to the contrary. *United States* v. *California,* 332 U.S. 19, 27 (1947); *FTC* v. *Guignon,* 390 F.2d 323, 324 (8th Cir. 1968), relying on 28 U.S.C. §§ 516 and 519, which respectively reserve the conduct of federal litigation to the Justice Department under the direction of the Attorney General, and the supervision of all such litigation to the Attorney General.

Included within the broad authority of the Attorney General to carry on litigation is the power to compromise.[1] *Halbach* v. *Markham,* 106 F. Supp. 475 (D. N.J. 1952), *aff'd,* 207 F.2d 503 (3d Cir. 1953), *cert. denied,* 347 U.S. 933 (1954). "This power is in part inherent, appertaining to the Office, and in part derived from various statutes and decisions . . . ." 38 Op. Att'y Gen. 98, 99 (1934). This formal Attorney

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[1] The words "compromise" and "settlement" will be used interchangeably in this memorandum.

General opinion cites numerous supporting opinions of the Attorney General and judicial precedents going back more than a century. *See also United States* v. *Newport News Shipbuilding and Dry Dock Co.*, 571 F.2d 1283, 1287 (4th Cir. 1978), *cert. denied*, 439 U.S. 875 (1978); *Castell* v. *United States*, 98 F.2d 891 (2d Cir. 1938), *cert. denied*, 305 U.S. 652 (1938); 38 Op. Att'y Gen. 124 (1934); and for bedrock authorities *see* the *Confiscation Cases*, 74 U.S. 454, 458 (1868), and *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 284 (1888).

The 1934 Attorney General's opinion contains an expansive description of the Department's authority to compromise cases. The opinion concludes that the Attorney General possesses authority to settle cases even when the agency charged with administering the underlying law would not have that authority. Indeed, the opinion was written as an elaboration upon an earlier formal opinion in which the Attorney General had held that the Secretary of the Treasury did not possess discretion to compromise income tax cases in the absence of bona fide disputed questions of facts. 38 Op. Att'y Gen. 94 (1933). The subsequent opinion was written to emphasize that when such cases are brought to the Department of Justice for litigation, the Attorney General could exercise that very power which was not available to the Secretary of the Treasury. The scope of the settlement prerogative in the Attorney General is broadly described:

> I have no hesitation in declaring that it is a power whether attaching to the office or conferred by statute or executive order, to be exercised with wise discretion and resorted to only to promote the Government's best interest or to prevent flagrant injustice, but that it is broad and plenary may be asserted with equal assurance, and it attaches, of course, immediately upon the receipt of a case in the Department of Justice. . . .

38 Op. Att'y Gen. at 102.

Subsequent to our receipt of your request, and after we had prepared an initial response, you advised me that it now appears unlikely that a settlement along the lines of your memorandum will prove possible. Given that change of circumstances, it is probably unnecessary to explore the limits on the Department's settlement prerogative. Instead, we offer the following general guideposts. First, as stated above, the Attorney General's power is quite broad and is of long-standing vintage. It is at least sufficiently broad to allow this Department to formulate a settlement proposal that differs from whatever litigating posture we have heretofore taken. Second, where genuine questions of fact remain (as, for instance, whether adequate assessment work was performed) the Attorney General can exercise his settlement authority with respect to those questions. On the other hand, it should go without saying that the Attorney General is bound by the duty imposed on the President under Article II of the Constitution to "take care that the laws be faithfully executed," and that consequently there may be some forms of settlement that would be foreclosed, as where the settlement would result in action plainly at variance with Congress' intent.

This latter point suggests a subtle issue. On the one hand, it is reasonably clear that the Attorney General—in the exercise of his settlement responsibilities—is not bound by each and every statutory limitation and procedural requirement that Congress may have specifically imposed upon some other agency head in the administration of that agency's programs. For this reason, the two cases cited in your memorandum—*West* v. *Standard Oil Co.*, 278 U.S. 200 (1929),[2] and *Cameron* v. *United States*, 252 U.S. 450 (1920)— are not controlling. Those cases deal with congressional requirements imposed on officials other than the Attorney General, and should not be thought to be directly applicable to him for the performance of his litigation function. On the other hand, Congress' will is surely not irrelevant to the Attorney General's discretion. With your approval, we agree that it is sensible to defer a more detailed consideration of the scope of, and limitations upon, the Attorney General's power until a precise proposal is developed.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

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[2] Because the question you have asked relates directly to the authority of the government to relinquish title to land held by the United States, cases like the Standard Oil case do highlight the tension we perceive in this area of the law. The Supreme Court, after citing well-settled authority for the proposition that the Secretary of the Interior has broad authority "to do justice to all claimants and preserve the rights of the people of the United States" with respect to property, was nonetheless quick to conclude that this:

> broad power of control and supervision conferred upon the Secretary "does not clothe him with any discretion to enlarge or curtail the rights of the grantee, nor to substitute his judgment for the will of Congress as manifested in the granting act."

278 U.S. at 220. If the Secretary's authority is so limited, it is reasonable to question whether the Attorney General's general litigation supervisory powers would give him a greater discretion. As noted above, if there is a greater ambit of discretion, it must be located in Congress' actions in creating a centralized litigating department and clothing it with overriding authority to settle particular cases.

Department of Justice Views on the Constitution Adopted by the Constitutional Convention of the Virgin Islands

[The following memorandum, initially drafted in the Office of Legal Counsel at the request of the Assistant Attorney General for Legislative Affairs, presents the Department of Justice's views on certain provisions of the constitution adopted by the 1980 constitutional convention of the Virgin Islands. This constitution was approved by Congress for submission to the people of the Virgin Islands by Pub. L. No. 97-21, 95 Stat. 105 (1981), but was subsequently rejected in a referendum. As of the date of publication of this volume, the Virgin Islands do not have a constitution. The following analysis of the provisions of the rejected constitution discusses important and recurring constitutional and legal issues arising in the context of federal-territorial relations.]

September 9, 1980

MEMORANDUM OPINION FOR THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

This responds to your request for the views of the Department of Justice on the constitution adopted by the constitutional convention of the Virgin Islands on July 31, 1980.

Section 2(a) of the Act of October 21, 1976, Pub. L. No. 94-584, 90 Stat. 2899, 48 U.S.C. preceding § 1541 ("Enabling Act"), authorized the legislature of the Virgin Islands to call a constitutional convention to draft a constitution for the local self-government of the people of the Virgin Islands within the existing territorial-federal relationship. Section 2(b) of the Act provided that such constitution shall: (1) recognize and be consistent with the sovereignty of the United States and the supremacy of the provisions of the Constitution, treaties and laws of the United States applicable to the Virgin Islands, including the provisions of the Organic Act of 1936 of the Virgin Islands and the Revised Organic Act of the Virgin Islands of 1954 which do not relate to local self-government; (2) provide for a republican form of government, consisting of three branches; (3) contain a bill of rights; (4) deal with the subject of those provisions of the Revised Organic Act of the Virgin Islands of 1954, as amended, which relate to local self-government; and (5) provide for a system of local courts consistent with the provisions of the Revised Organic Act of the Virgin Islands, as amended.

Sections 4 and 5 of the Enabling Act provide that the constitutional convention shall submit to the Governor of the Virgin Islands a proposed constitution which shall comply with the requirements of § 2(b). The Governor in turn shall submit the constitution to the President of the United States, who shall transmit it to Congress within 60 calendar days together with his comments. The constitution shall be "deemed approved" by Congress within 60 days after its transmittal by the President, unless prior to that date Congress, by Joint Resolution subject to the approval of the President, has approved, modified, or amended it. The draft constitution as approved or modified by Congress shall then be submitted to the qualified voters of the Virgin Islands in a referendum for acceptance or rejection.

I. Recognition of the Sovereignty of the United States and Supremacy of the Constitution and Laws of the United States

In contrast to the 1978 constitution,[1] this constitution does not expressly comply with the requirement of § 2(b)(1) of the Enabling Act that it recognize the sovereignty of the United States and the supremacy of its Constitution and of those of its laws that are applicable to the Virgin Islands. Indeed, Article V, § 1 of the constitution refers to the supremacy of the constitution of the Virgin Islands and of the laws enacted under it without any reference to the supremacy of the Constitution and laws of the United States.

If the Enabling Act did not contain this express requirement, the failure of the constitution to recognize the sovereignty of the United States and the supremacy of its Constitution and laws would not have any substantial legal consequences because they are implied in the Organic Act and flow from the territorial relationship. Indeed, few if any state constitutions specifically refer to the sovereignty of the United States or the supremacy of its Constitution and laws. The same is true of the recently adopted constitution of the Northern Mariana Islands.

Moreover, the preamble to the constitution declares that the Virgin Islands assume "the responsibilities of self-government in political union with the United States"; in the draft official analysis of the constitution,[2] the comments on the preamble contain the statement in "accordance with section 2(b) of U.S. Public Law 94-584 (October 21, 1976) [the Enabling Act] recognition is given to the sovereignty of the United States over the Virgin Islands"; and finally, Article V, § 1 of the constitution provides that the legislative power of the Virgin Islands "shall extend to all subjects . . . consistent with . . . the Constitution and laws of the United States applicable to the Virgin Islands." During the Senate hearings on the 1978 Guam constitution,[3] which also failed to recognize expressly the sovereignty of the United States and the supremacy of its Constitution and laws, the Department of the Interior and the Department of Justice concluded that analogous provisions in the Guam constitution and its official analysis constituted at least substantial compliance with § 2(b)(1) of the Enabling Act.[4] In particular, the Department of Justice took the position that, as the result of nearly 200 years of history, the term "political union with the United States" necessarily carries with it recognition of the sovereignty of the United States and the supremacy of its laws.[5] The Department of the Interior indicated that the definition of the legislative power of Guam carried with it the recognition of the supremacy of the Constitution and laws of the United States.[6] The Department of Justice concluded:

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[1] The constitution adopted by the 1978 constitutional convention of the Virgin Islands was "deemed approved" by Congress but was defeated in the referendum.

[2] We have not as yet received the final text of those comments as approved by the constitutional convention.

[3] The 1978 Guam constitution was also defeated in a referendum.

> Indeed, it seems to us that this statement in the preamble is sufficient to overcome any contention that the explicit or tacit approval of the constitution by Congress would have the effect of relinquishing the sovereignty of the United States over Guam and the supremacy of Federal laws.[7]

On the basis of this history, we conclude that this proposed constitution is in substantial compliance with § 2(b)(1) as regards this point.

II. Bill of Rights

The Bill of Rights, Article I of the constitution, does not appear to be in conflict with the Enabling Act or any pertinent federal law. However, we believe that some of its provisions and related sections in other parts of the constitution have not been drafted with adequate clarity and precision. As President Carter pointed out on April 28, 1978, in his comments on the Guam constitution (Pub. Papers of Jimmy Carter 795, 796–97 (1978)), such vagueness may result in litigation that could burden or curtail effective local government.

1. *Article I, § 1: Fundamental Rights*

The first sentence of this section would provide that "the dignity of the human being is inviolable." There is no definition of the scope of the elusive term "dignity." It is not clear whether the section is directed only at governmental action or also at private action, and whether the first sentence is supposed to be defined by the two sentences following it. Moreover, the relationship between the equal protection clause in the second sentence and the prohibition against discrimination in the third sentence is unclear.

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[4] *Constitution of Guam,* Hearing before the Committee on Energy and Natural Resources, United States Senate, 95th Cong., 2d Sess. 60–67 (1978) ("Hearing").

[5] *Id.,* at 64.

[6] *Id.,* at 61.

[7] *Id.,* at 64.

2. *Article I, § 3: Right of Privacy*

This section seems to create an absolute right of privacy that cannot be limited or defined by statute. Again, it is not clear whether this clause is directed only at governmental action or also at private action. Moreover, while under Article I, § 4 of the Virgin Islands constitution the right to know provided for in that section would yield to the right of privacy, the constitution does not attempt to solve potential conflicts between the "absolute" right of privacy under § 3 and the freedom of speech and of the press guaranteed by Article I, § 2 of the Virgin Islands constitution and the First Amendment to the Constitution of the United States.[8] *Cf., New York Times* v. *Sullivan,* 376 U.S. 254 (1964).

3. *Article I, § 4: Right to Know*

This section would authorize any person to examine any public document and observe the deliberations of any agency of the government subject to reasonable limitations, as may be provided by law. It is not clear whether the term "reasonable limitation as may be provided by law" refers only to statutory limitations to be enacted in the future or whether it includes existing statutory and common law restrictions on the access to documents and deliberations. If the former interpretation is the correct one, all public documents, including classified documents, and all deliberations of governmental bodies, including courts, grand juries, and petit juries, would be open to the public pending the enactment of the pertinent legislation. Considering the controversial nature of the subject matter, the adoption of such legislation may take some time. And even then there may be complex litigation as to whether the statutory limitations are reasonable.

4. *Article I, § 5: Searches and Seizures*

The third sentence, which prohibits the interception of communications unless authorized by warrant, would in its breadth appear to require the use of warrants even for the one-party consensual interception of communications. In view of the preemption of this field by chapter 119 of Title 18, United States Code, this section is plainly limited to prosecutions under local law and should not affect federal prosecutions.

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[8] The Bill of Rights for the Virgin Islands embodied in its Organic Act expressly extends the First Amendment to the Constitution of the United States to the Virgin Islands with "the same force and effect there as in the United States or in any State of the United States." 48 U.S.C. § 1561.

5. *Article I, § 10(e): Child Labor*

This subsection prohibits child labor in certain instances but does not define the term "child" by reference to age.

6. *Article I, § 15: Implementation of Rights*

The second sentence gives the Senate the power to provide by law for the implementation and enforcement of this article. This sentence raises doubts whether and to what extent the provisions of the Bill of Rights are self-executing, and whether they require statutory implementation in order to become effective. This point should be clarified.

7. *Article IX, § 1(b): Free Education*

The third sentence of this subsection provides that public elementary and secondary education shall be "essentially" free. The word "essentially" is undefined and may well become the source of needless and time-consuming litigation.

8. *Article X, § 7: Right to a Healthful Environment*

According to this section, every person has the right to a healthful environment subject to reasonable limitations, as provided by law. This right may be enforced "against any party subject to reasonable limitations as may be provided by law." The effect of this broad provision is to confer constitutional dimensions to the law of nuisances and to invite litigation to determine whether statutory limitations on this constitutional right are or are not reasonable.[9]

III. Citizenship

Article III, § 1 of the constitution defines the term "Virgin Islander" as a person born in the Virgin Islands or a descendant of at least one parent who was born in the Virgin Islands. The term Virgin Islander does not appear anywhere else in the constitution; therefore, its inclusion would not appear to have any legal consequences. On the other hand, its presence could encourage the enactment of discriminatory legislation favoring Virgin Islanders.

Section 2, Article III defines the term "citizens of the Virgin Islands." We must comment adversely on this section because the definition of that term is preempted by federal law and because § 2 is in conflict with that law.

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[9] We have been advised that this section is based on Article XI of the Illinois Constitution of 1970. There has been a substantial amount of litigation involving that article, but in the time available we have been unable to assess the possible implications of that litigation in the context of the Virgin Islands constitution assuming, *arguendo*, that the Virgin Islands' courts would interpret this provision in a way similar to the interpretation given by the Illinois courts to their provision.

The first sentence of the first section of the Fourteenth Amendment provides that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State in which they reside." Concededly, the direct applicability of the Fourteenth Amendment to the territories has not been settled as yet. *See, e.g. District of Columbia* v. *Carter,* 409 U.S. 418, 423 (1973); *Examining Board* v. *Flores de Otero,* 426 U.S. 572, 601 (1976); *Torres* v. *Puerto Rico,* 442 U.S. 465, 469–71 (1979).[10] However, the Bill of Rights of the Virgin Islands contained in the Organic Act specifically extends to the Virgin Islands the Privileges and Immunities Clause of the second sentence of § 1 of the Fourteenth Amendment with "the same force and effect there as in the United States or any State of the United States." 48 U.S.C. § 1561. One of the privileges and the immunities of a citizen of the United States is the privilege to be a citizen of the State in which he establishes his residence. The *Slaughter-House Cases,* 83 U.S. (16 Wall.) 36, 80 (1872). Citizenship in a state or a territory such as the Virgin Islands to which the Privileges and Immunities Clause of the Fourteenth Amendment extends accordingly is preempted by federal law and exists without reference to or interference by state constitutions or laws. *United States* v. *Hall,* 26 Fed. Cas. 79, 81 (C.C.S.D. Ala. 1871) No. 15,282. As the court held in the *Slaughter-House Cases, supra,* at 95, "[a] citizen of a State is now only a citizen of the United States residing in that State."

Moreover, § 2 of Article III is inconsistent with the Citizenship Clause of the Fourteenth Amendment. That clause has been interpreted as follows:

1. Only a citizen of the United States can be a citizen of a State or Territory. The *Slaughter-House Cases, supra,* at 95; *United States* v. *Hall, supra,* at 81; *Colgate* v. *Harvey,* 296 U.S. 404, 427 n.3 (1935); *Sharon* v. *Hill,* 26 F. 337, 343 (C.C.D. Cal. 1885); *Factor* v. *Pennington Press, Inc.,* 230 F. Supp. 906, 909 (N.D. Ill. 1963);
2. A citizen of the United States becomes a citizen of the State or Territory in which he resides *immediately* upon the establishment of his residence therein. *Morris* v. *Gilmer,* 129 U.S. 315, 328 (1889); *Paudler* v. *Paudler,* 185 F.2d 901, 902 (5th Cir. 1950), *cert. denied.* 341 U.S. 920 (1951); and
3. A citizen of a State or Territory loses his citizenship therein when he establishes another residence. *Paudler* v. *Paudler, supra,* 185 F.2d at 902 and authorities cited therein.

Section 2 is inconsistent with those federally established rules of state citizenship. Section 2(a) would provide that all persons born in the

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[10] We note that the Department of Justice did not participate as a party or *amicus curiae* in these cases.

Virgin Islands and subject to its jurisdiction are citizens thereof. It does not comply with the federal requirement that citizenship in a State or Territory is contingent on U.S. citizenship [11] and on residence in the Territory.

Section 2(b) would provide that citizens of the United States who were born outside the Virgin Islands become citizens of the Virgin Islands only after they have been domiciled there for at least one year. This is inconsistent with the federal constitutional requirement that a citizen of the United States becomes the citizen of a State or Territory immediately upon the establishment of his residence therein.[12] The one-year residence requirement for the acquisition of Virgin Islands' citizenship is of particular importance in view of Article IV, § 1 of the constitution, pursuant to which the right to vote is conditioned on Virgin Islands' citizenship. The combination of Articles III, § 2(b) and IV, § 1 thus has the practical effect of subjecting the right to vote in the Virgin Islands to a one-year durational residence requirement. The Supreme Court has found such a requirement to be unconstitutional. *Dunn* v. *Blumstein,* 405 U.S. 330 (1972).

Section 2(c) would in effect provide Virgin Islands' citizenship to all those who are United States citizens pursuant to § 306(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1406(a)(1). The subsection fails to recognize that Virgin Islands' citizenship is conditioned on residence in the Virgin Islands.

Section 2(d) would provide for Virgin Islands' Citizenship contingent upon the enactment of appropriate federal legislation, presumably legislation granting United States citizenship to certain persons born in the Virgin Islands who resided outside the United States between January 17, 1917 and June 28, 1932 (§ 306 of the Immigration and Nationality Act, 8 U.S.C. § 1406). This subsection is defective because it does not limit Virgin Islands' citizenship to those who reside in the Virgin Islands and does not require continued United States citizenship. Furthermore, this subsection would deny Virgin Islands' citizenship to persons who are citizens or subjects of another country, although they are citizens of the United States.

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[11] Pursuant to § 306 of the Immigration and Nationality Act, 8 U.S.C. § 1406, not all persons born in the Virgin Islands prior to February 25, 1927, are citizens of the United States and some persons born in the Virgin Islands as United States citizens may subsequently have lost that citizenship under § 347 of the Immigration and Nationality Act, 8 U.S.C. § 1481.

[12] Our attention has been directed to § 5(a) of the Puerto Rico Federal Relations Act, 48 U.S.C. § 733a, which imposes a one-year residence requirement on the acquisition of Puerto Rican citizenship by citizens of the United States. This provision was enacted by Congress (Act of March 4, 1927, § 2, 44 Stat. 1418) and not by a Territory to which the Privileges and Immunities Clause of the Fourteenth Amendment has been extended. We express no opinion whether Congress could constitutionally impose a one-year residence requirement in the Virgin Islands.

IV. Composition of the Senate

Article V, § 2 provides that the Senate, the unicameral legislature of the Virgin Islands, shall consist of fifteen members, that there shall be no more than four senators elected at-large, and that the legislative districts of St. Croix, St. John, and St. Thomas shall each be represented. Since the number of inhabitants of St. John is much smaller than that of the other two islands, the requirement that there shall be at least one Senator from St. John potentially violates the one-man-one-vote rule.[13] Whether such a violation would ultimately occur would likely turn on specific facts in existence at that time. The one-man-one-vote rule does not require absolute equality. It permits some deviations designed to recognize the integrity of political subdivisions, or the recognition of natural or historical boundary lines. *See, e.g.*. *Reynolds* v. *Sims*, 377 U.S. 533, 574–75, 579–81 (1964); *Swann* v. *Adams*, 385 U.S. 440, 444 (1967). *See also* S. Rep. No. 433, 94th Cong., 1st Sess. 69 (1975) (discussing with approval a similar departure from the one-man-one-vote rule in § 203(c) of the Covenant with Northern Mariana Islands, Pub. L. No. 94–241, 90 Stat. 265, 48 U.S.C. § 1681 note).

Article V does not establish a term for the senators and does not provide that their terms are to be determined by statute.

V. Residence Requirement for the Governor and Lieutenant Governor

Article VI, § 3(e) of the constitution provides that the governor and lieutenant governor must have been domiciled in the Virgin Islands for fifteen years, five of which must immediately precede the date of taking office. This provision exceeds by one year the residency requirement for the President of the United States (U.S. Const. Art. II, § 1, cl. 4) and by one-half the longest existing residence requirement for state governors.[14]

The validity of this provision is questionable. The Supreme Court has held that candidates for public office "do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications." *Turner* v. *Fouche*, 396 U.S. 346, 362 (1970); *Bullock* v. *Carter*, 405 U.S. 134, 142–44 (1972). In *Illinois Election Board* v. *Socialist Workers Party*, 440 U.S. 173, 185 (1979), the Court pointed out that where the access to the ballot is concerned[15] the State, even where it seeks to protect a legitimate interest, has to adopt the least drastic means to achieve that end.

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[13] We are not aware of any reported case specifically applying the one-man-one-vote rule to the Territories. The Virgin Islands' Bill of Rights, however, specifically extends the Equal Protection Clause of the Fourteenth Amendment to the Virgin Islands to have the same force and effect there as in a State. 48 U.S.C. § 1561.

[14] According to *Chimento* v. *Stark*, 353 F. Supp. 1211, 1217 (D.N.H. 1973), *aff'd* 414 U.S. 802 (1973), in 1973, 43 states had residence or citizenship requirements for the office of governor: ranging from ten years (Louisiana, Missouri, and Oklahoma) to one year (Minnesota).

[15] *Bullock* v. *Carter*, *supra*, at 142–43, explained that in the area of placing burdensome limitations on the qualification of candidates, "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."

The Supreme Court has not as yet passed on durational residence requirements for the holding of office. It has summarily affirmed three decisions which upheld five- to seven-year residence requirements for the offices of state senator and state governor. *Chimento* v. *Stark, supra,* (seven years; state governor); *Kanapaux* v. *Ellisor* (D.S.C. unreported), *aff'd* 419 U.S. 891 (1974) (five years; state governor); *Sununu* v. *Stark,* 383 F. Supp. 1287 (D.N.H. 1974), *aff'd* 420 U.S. 958 (1975) (seven years; state senator).

The official analysis of the constitution gives the following reasons for the fifteen-year residence requirement:

> While this domiciliary requirement is longer than that for similar offices in the States of the Union, it is intended to insure to the greatest extent possible familiarity with the particular problems of the Virgin Islands. Such familiarity is not as easily acquired as it might be in the continental United States, among other reasons, due to the Virgin Islands' status as an unincorporated territory of the United States and to its geographical, historic, social, economic position and unique culture as a group of small islands in the Eastern Caribbean.

In *Chimento, supra,* the district court similarly justified the seven-year residency requirement for the Governor of New Hampshire by reference to the need of that officer to be familiar with and exposed to the conditions, problems, and needs of the State and the various requirements of its population. The court, however, conceded that the seven-year requirement "may approach the constitutional limit." 353 F. Supp. at 1217. It may be significant, at least under the *Chimento* court's analysis, that in 1972, New Hampshire had nearly 780,000 inhabitants and covered a land area of 9,033 square miles, *id.* at 1215 n.8, while according to the 1970 census, the Virgin Islands had 62,000 inhabitants and covered 133 square miles.

On the other hand, there are several instances in which federal courts have struck down residence requirements for state or local officials. Thus, the Eighth Circuit, in *Antonio* v. *Kirkpatrick,* 579 F.2d 1147, 1151 (8th Cir. 1978), held that a ten-year residency requirement for the office of State Auditor for the State of Missouri constituted a denial of equal protection and did not bear a rational relationship to a legitimate state end. The district court, in *Billington* v. *Hayduk,* 439 F. Supp. 975, 979 (S.D.N.Y.), *aff'd on other grounds,* 565 F.2d 824 (2d Cir. 1977), invalidated "as impermissible under the Equal Protection Clause" a five-year residence requirement for the office of County Executive for Westchester County, New York. According to the 1970 census, that county had 984,000 inhabitants and covered 443 square miles. The district court, in *Alexander* v. *Kammer*, 363 F. Supp. 324 (E.D. Mich. 1973), held that a five-year residence requirement for the Office of City Commissioner of the City of Pontiac, the population of which is similar to that of the Virgin Islands, was not supported by a compelling governmental interest. And in *Brill* v. *Carter*, 455 F. Supp. 172 (D. Md. 1978), the district court held unconstitutional a four-year residence requirement for the office of councilman for Anne Arundel County (300,000 inhabitants, 423 square miles).[16]

The argument supporting the fifteen-year requirement would be that the responsibilities of the Governor—even of a small Territory—differ substantially from those of the head of a county—even of a large one—and that the conditions in the Virgin Islands are quite different from those that prevail on the mainland. These considerations would support an extended durational residence requirement if the latter is based, as is assumed in many cases on the need of the prospective official to acquaint himself with the problems of the area and its inhabitants and to have extended exposure to the electorate. These points, however, are counterbalanced, at least in part, by the small size of the Virgin Islands and its population. We therefore believe there is every reason to question whether the courts will uphold a residence requirement that is more than twice as long as the New Hampshire seven-year period, which the *Chimento* court, *supra*, had characterized as probably "approach[ing] the constitutional limit."

On the other hand, we do not believe that the various five-year residence requirements provided for in the constitution should give rise to serious constitutional problems. *See, e.g.,* Article V, § 4(e) (senator); Article VII, § 6(b) (judge); Article XI, § 4(b) (auditor general).

VI. Judicial Branch

Article VII, §§ 1 & 2 of the constitution provide for an appellate court. This provision is in conflict with § 2(b)(6) of the Enabling Act, pursuant to which the "system of local courts provided for in the constitution must be consistent with the Revised Organic Act of the Virgin Islands." The pertinent provisions of the Revised Organic Act, §§ 22 & 23, 48 U.S.C. §§ 1612, 1613 do not provide for a local appellate court; appeals from the local courts go to the federal district court.

Article VII, § 2 contains defects in addition to its being inconsistent with the Enabling Act. The last sentence provides that appeals from decisions of the appellate court on federal questions will go to the United States Court of Appeals for the Third Circuit unless Congress provides otherwise. The United States courts of appeals, however, are purely statutory courts and have only such jurisdiction as is conferred on them by Congress. *See, e.g., Gialde* v. *Time, Inc.*, 480 F.2d 1295,

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[16] The opinion contains an analysis of many pertinent decisions. 455 F. Supp., at 175.

1298 (8th Cir. 1973). A territorial constitution therefore cannot confer appellate jurisdiction on a United States court of appeals. Consequently, there would be no federal forum for the review of decisions of the appellate court involving federal questions. This raises a problem similar to that involved in *Guam* v. *Olsen*, 431 U.S. 195, 201–04 (1977). The Supreme Court held in *Guam* that in the absence of a "clear signal from Congress," a Territory cannot establish a court if its decisions involving federal questions are not reviewable by a court established under Article III of the Constitution.[17] Hence, even if § 2(b)(6) of the Enabling Act had not prohibited the establishment of an appellate court, the Virgin Islands still could not create such a court in the absence of *federal* legislation providing for the review of its decisions involving federal questions in an Article III court.[18]

The judicial provisions of the constitution raise an additional problem. Section 5 of the Transitional Schedule would establish an interim appellate court consisting of the two district judges for the Virgin Islands and a chief judge appointed pursuant to the provisions of the constitution. According to the constitution, the appellate court would have several not strictly judicial functions, such as to promulgate reapportionment plans (Article V, § 3(b)), to sit as a court of impeachment (Article V, § 12), and to determine questions involving the disability of the Governor and Lieutenant Governor (Article VI, § 9(b)). Since territorial judges are not Article III judges, they could be vested with nonjudicial functions. Nevertheless, the involvement of federal judges in those delicate local political issues may become a source of embarrassment. Moreover, since the appellate court would act as an administrative body in those situations, its decision could conceivably be subject to judicial review in the federal district court, composed of the same judges who handed down the decision in their capacity as members of a territorial judicial body performing nonjudicial functions.

Article VII, § 4 establishes a commission to deal with judicial misconduct and disability. In view of its serious impact on judicial independence, this section should have been drawn with greater precision. It lacks provisions for the selection of the commission and for the qualification of its members, as well as any standards for the discipline, censure, suspension, removal, and compulsory retirement of judges. The section provides for the "appeal" of decisions of the judicial commission. In case of actions taken by the commission against appellate judges, recusations may result in a lack of quorum in the appellate court, or require under the necessity doctrine the participation of judges who ordinarily would have to disqualify themselves in view of their connection or involvement with the subject matter of the appeal. This problem, however, is inherent in judicial discipline proceedings and not confined to the Virgin Islands. The implementing legislation could provide for the temporary assignment to the appellate court of trial court judges to sit in lieu of disqualified appellate judges.

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[17] Indeed, the Court indicated that constitutional issues might be presented if Congress sought to deny litigants in a local territorial court access to an Article III court for the apppellate review of local-court decisions. 431 U.S. at 204.

[18] The second sentence of Article VII, § 2 provides that the decisions of the appellate court on nonfederal questions shall be final, unless federal law provides for their review by the Supreme Court of the United States. In our view, it is up to Congress to determine which federal court, if any, shall review cases decided by the Virgin Islands appellate court which do not involve federal questions. If Congress should decide that there should be such review, it would generally be more appropriate that it be had, at least initially and as a matter of right, in the court of appeals rather than in the Supreme Court.

VII. Tax Administration and Tax Exemption of Territorial Bonds

Article XI, § 2 provides that:

> Laws shall be enacted to administer and enforce the income tax and the federal tax laws applicable to the Virgin Islands.

This section must be read in the context of § 2(b)(1) and (4) of the Enabling Act, which limits the constitution to subject matters relating to local self-goverment.

The Virgin Islands presently operates under a so-called "mirror system" of taxation with the Internal Revenue Code administered and enforced by the Virgin Islands as a territorial income tax. Act of July 12, 1921, § 1, 42 Stat. 123 (48 U.S.C. 1397). *Dudley* v. *Commissioner of Internal Revenue,* 258 F.2d 182 (3d Cir. 1958). Under the present law a constitutional provision to enact territorial laws to administer and enforce this territorial income tax would not be objectionable. There are, however, indications that the income tax will be "federalized" in the Virgin Islands. President Carter proposed in his Message on Federal Territorial Policy of February 14, 1980, Pub. Papers of Jimmy Carter 317, 322 (1980), that legislation be enacted making the Internal Revenue Code directly applicable to the territories for income tax purposes and providing that the Internal Revenue Service, rather than the territories, be responsible for its administration and enforcement. The Department of the Treasury has drafted a proposed Territorial Tax Act to implement the presidential message which is presently under consideration by the Office of Management and Budget. Legislation to that effect has been introduced in Congress.*See* S. 2017, 96th Cong., 1st Sess. (1979). We have also been advised that a pertinent provision may be inserted in the current Territorial Omnibus Bill now pending in the House of Representatives. Should this legislation be enacted, the income tax laws would cease to be a matter of self-government in the Virgin Islands and the reference in this section to the income tax laws would become inconsistent with the Enabling Act.

To the extent that Article XI, § 2 would provide for the enactment of legislation to administer and enforce "the federal tax laws applicable to the Virgin Islands," the section deals with a subject matter which does not relate to self-government; consequently it violates the terms of the Enabling Act.

The second paragraph of Article XI, § 3 would exempt the bond issues of the Virgin Islands, and specifically the interest thereon, from taxation by the Federal Government, any State, Territory, or the District of Columbia. The exemption of the bond issues of the Virgin Islands from taxes imposed by the Federal Government or the States, Territories, or the District of Columbia clearly is not a matter of local self-government and therefore not authorized by the Enabling Act. (*See* §§ 2(b)(1),(d)). Only Congress can grant such tax exemption.

VIII. Continuation of Laws

Section 3 of the Transitional Schedule provides:

> Laws, executive orders, and regulations . . . that are inconsistent with this Constitution shall be void to the extent of such inconsistency.

This sentence does not in terms limit its scope to laws, executive orders, and regulations relating to matters of local self-government. It would be unauthorized if it purported to apply to matters over which the Federal Government retained jurisdiction. The draft official analysis of the constitution [19] states that this section does not cover laws, executive orders, or regulations that are beyond the authority of the Virgin Islands, such as federal laws. The need to rely on the legislative history to ascertain the scope of a constitutional clause, however, is an undesirable drafting technique, especially in light of the frequently adhered to canon of statutory construction which prohibits the use of interpretative materials where a text appears to be unambiguous on its face.

IX. Summary and Effect of the "Deemed" Approval of the Constitution

In summary, the constitution does not expressly comply with the requirements of the Enabling Act to recognize the sovereignty of the United States and the supremacy of its Constitution and laws. Moreover, it raises the following substantial legal issues: (1) questions regarding Virgin Islands' citizenship; (2) the durational residence requirements for the Governor and Lieutenant Governor; (3) the appellate court; and (4) the fiscal provisions. In addition, some of its provisions are drawn so loosely as to invite vexatious and possibly paralyzing litigation. In this category are the provisions guaranteeing the inviolability of the dignity of the human being, the absolute right of privacy, and the right to a healthful environment.

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[19] *See* note 2, *supra.*

In 1978, Congress did not take any action on the constitutions drafted by the constitutional conventions of Guam and the Virgin Islands within the 60-day period provided for in § 5 of the Enabling Act. The two constitutions accordingly were submitted to the voters of Guam and the Virgin Islands, respectively, and both of them were defeated. In view of the possibility that Congress again will fail to pass a joint resolution modifying the previously mentioned legal defects of the constitution, it appears appropriate to consider the legal consequences of the "deemed" approval of the constitution resulting from congressional failure to act.

Basically, Congress can take legal action only in the manner provided for in Article I, § 7 of the Constitution, *i.e.*, by the concurrence of both Houses to a bill or resolution and its presentation to the President. Inaction of Congress therefore cannot have any legal effect, except as, in this case, as the occurrence of a condition which permits the submission of the constitution to the qualified electors of the Virgin Islands. Taking this view, the inaction of Congress would not have any curative effect on the defects of the constitution.

The result, however, would be no different if it were assumed *arguendo* that the omission of Congress to object to the failure of the constitution to comply with the requirements of the Enabling Act has the effect of waiving that noncompliance. Any such waiver would logically be limited to the provisions of the Enabling Act itself. It could not override constitutional requirements such as those involved in the issues relating to the Virgin Islands' citizenship and the durational residence requirements of the Governor or Lieutenant Governor. Similarly, such waiver could not override other existing statutes or serve as a substitute for the enactment of a statute. Thus, in connection with the appellate court issue, it could possibly be argued that the "deemed" approval of the constitution overcomes the requirement of the Enabling Act that the court system be consistent with the existing one, hence, that the constitution could provide for an appellate court. The supposed waiver, however, could not have the effect of granting a federal appellate court jurisdiction to review the decisions of the Virgin Islands' appellate court. That can be done only by positive legislation. Again, the supposed waiver could not override or modify the existing statutes providing for the administration of federal tax laws by federal agencies, or take the place of a statute granting Virgin Islands bonds exemption from federal or state taxation.

ALAN A. PARKER
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Office of Legislative Affairs

General Accounting Office Request for Documents of the Federal Emergency Management Agency

The General Accounting Office Act of 1980 gives the General Accounting Office (GAO) new power to enforce its requests for information from executive branch agencies, but does not limit or expand GAO's underlying statutory authority to obtain such information.

In requesting documents of the Federal Emergency Management Agency (FEMA), GAO acts as an agent of the Congress and therefore has the benefit of the same protection against an executive agency's assertion of the Freedom of Information Act (FOIA) exemptions as does the Congress and its committees. Accordingly, FEMA may not assert FOIA exemption (b)(5) as a basis for declining to release documents to GAO.

The executive branch may, in appropriate circumstances, exercise its constitutional authority to decline to release information in order to safeguard the discharge of its functions.

September 10, 1980

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

This responds to the inquiry from your Office whether the General Accounting Office Act of 1980 (GAO Act) [1] provides a basis on which the Federal Emergency Management Agency (FEMA) [2] may decline to provide the General Accounting Office (GAO) certain documents it has requested. The GAO has requested access to FEMA's documents relating to that agency's recommendations to the President regarding emergencies and major disasters. Your Office explained that the requested documents include requests from Governors for declarations by the President of emergencies or major disasters.[3] Also, such files include analyses of the Governors' requests by FEMA's regional and national staff and officials, as well as transmittal memoranda to the President recommending whether to declare an emergency or major disaster.[4]

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[1] Pub. L. No. 96-226, 94 Stat. 311.

[2] FEMA was created pursuant to Reorganization Plan No. 3 of 1978, 43 Fed. Reg. 41,943, to coordinate the exercise of powers previously dispersed among several agencies under which the federal government assists states in situations of "emergency" and "major disaster." *See also* Executive Order No. 12,127, 3 C.F.R. 376 (1980).

[3] *See* 42 U.S.C. § 5141; 44 C.F.R Part 20.

[4] Your staff has confirmed that in a particular case in which FEMA makes a recommendation to the President, a covering memorandum will be prepared in the White House by the Domestic Policy Staff. We understand that the GAO has not requested these memoranda and that, in any event, they are not generally available in FEMA's files.

I.

Your opinion request raises the general question whether the recently enacted GAO Act creates any new bases on which the executive branch would be authorized to deny the GAO's informational request. For the first time, that Act extended to the GAO authority to proceed to court to enforce its informational requests directed at executive agencies. It also limited the Comptroller General's power to proceed to court in certain circumstances. Among the checks on the Comptroller General's authority to go to court is one pertaining to records withholdable from a private requester under exemption (b)(5) of the Freedom of Information Act (FOIA),[5] the disclosure of which could reasonably be expected substantially to impair the operations of the federal government. In order for FEMA to avail itself of this exemption, the President or the Director of the Office of Management and Budget must certify in writing that these conditions have been satisfied, and such official must fully explain his action.[6] The legislative history makes plain that Congress intended such a certification procedure to be used sparingly, and only after a process of attempted accommodation by both branches of government had been allowed to run.[7]

Your Office's inquiry, which takes note of the foregoing exemption from the GAO's authority to proceed to court, asks whether it provides a basis on which FEMA would be authorized to decline the GAO's informational request. For the reasons that follow, we conclude that this provision of the GAO Act does not confer on FEMA—or on any other agency from which the GAO seeks information—an independent basis for refusing to provide information. It should be clearly understood, however, that the documents your staff has described to us might nonetheless be properly withheld from the GAO depending on the considerations that historically have governed the relationship between the GAO and the executive branch.[8]

A central concern underlying passage of the GAO Act was to give the Comptroller General authority to seek judicial resolution of disputes with executive departments regarding access to documents. Prior to the Act's passage, the GAO had little recourse when confronted with uncooperative executive branch agencies other than to report the dispute to the appropriate congressional committees. Supporters of the legislation claimed that on occasion this process has proved inadequate, and that if the GAO were to perform its responsibilities in a thorough and timely manner, it must have the authority to seek judicial assistance. *See* H.R. Rep. No. 425, 96th Cong., 1st Sess. 4–9 (1979).

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[5] 5 U.S.C. § 552(b)(5) pertains to "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . . ."

[6] *See* § 102(d)(3) of the GAO Act.

[7] *See* S. Rep. No. 570, 96th Cong., 2d Sess. 8 (1980).

[8] These considerations, grounded in the constitutional relationship between the executive and legislative branches of government, are applied on a case-by-case basis. *See* note 13 *infra*.

Repeatedly during the hearings and debates on the bill, the point was made that its authors intended to broaden the GAO's enforcement powers while leaving untouched the underlying statutes providing authority for the GAO to conduct audits and investigations. Two passages in the report of the Senate Committee on Governmental Affairs make clear that the bill was not intended to limit or expand the GAO's basic authority to obtain information from executive agencies:

> It is important to recognize that *this legislation is not intended to alter in any way the current GAO right of access to records* to which GAO is entitled by statute. The legislation is neutral regarding any dispute concerning such right of access.[9]
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> * * * * *
>
> Although *the Comptroller General's statutory right of access is not diminished by this legislation,* the President or the Director of the Office of Management and Budget may preclude his access to court once subsection (d)(3) is invoked.

S. Rep. No. 570, 96th Cong., 2d Sess. 8, 7 (1980) (emphasis added). As these passages confirm, the bill's extension to the GAO of power to go to court does not affect the GAO's otherwise-existing statutory rights of access to information from the executive branch. Thus, § 102 does not create any new basis for limiting those rights.[9] Similarly, § 102 does not expand the GAO's existing statutory rights of access to agency records.[10]

II.

The further issue arises whether, putting aside the GAO Act, FEMA nonetheless may assert a right under the FOIA to decline to release to the GAO documents that would be withholdable from a private citizen under FOIA exemption (b)(5). The FOIA explicitly notes that its exemptions from disclosure of agency records provide no authority to withhold information from Congress. *See* 5 U.S.C. § 552(c). The FOIA's legislative history underscores that since the Act refers only to the public's right to know about governmental activity; its provisions, including its exemptions, ". . . cannot . . . be backhandedly construed as authorizing the withholding of information from the Congress, the collective representative of the public." S. Rep. No. 813, 89th Cong., 1st Sess. 10 (1965); *see also* H.R. Rep. No. 1497, 89th Cong., 2d Sess. 11–12 (1966).

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[9] *See* 125 Cong. Rec. 4287 (1980) (where the floor sponsor, Senator Glenn, makes clear that the bill is designed to strengthen "GAO's existing authority to enforce its statutory right of access to records of Federal agencies . . . .").

[10] *See* H.R. Rep. No. 425, 96th Cong., 1st Sess. 6, 8 (1979); *General Accounting Office Act of 1979, Hearings before a Subcomm. of the House Comm. on Government Operations,* 96th Cong., 1st Sess. 1, 92 (1979) (Rep. Brooks); 125 Cong. Rec. 29,830 (1979) (Rep. Brooks). We note that another section of the GAO Act, § 101, does expand the GAO's access rights by granting the GAO authority to obtain certain agency records dealing with "unvouchered accounts." This provision is not at issue in your Office's inquiry.

Of course, Congress may and frequently does act through its agents, such as its committees or subcommittees. Just as the FOIA exemptions cannot be asserted against the Congress as a whole, they cannot be asserted against its agents; as the District of Columbia Circuit Court of Appeals has written: "a construction of section 552(c) which would relate it only to action of Congress as an entity would render the provision largely meaningless, and it is no doubt for that reason that it has previously been implicitly rejected by this court, at least with regard to the release of information to standing committees of the Congress." *Murphy* v. *Dept. of Army*, 613 F.2d 1151, 1156–57 (D.C. Cir. 1979). Accordingly, the question arises whether the GAO, in requesting FEMA's documents, acts as an agent of the Congress and therefore has the benefit of the same protection against an executive agency's assertion of the FOIA exemptions as does the Congress and its committees.

We have frequently noted that, when the GAO is acting pursuant to its statutory authority in investigating executive agencies on behalf of Congress, it acts as an agent of the Congress. The status of the GAO as an arm of the Congress has been traditionally recognized by Congress,[11] as well as by the GAO itself and other authorities.[12] Since the GAO conducts any lawful investigation in its role as an agent of Congress, it follows that an executive agency—including FEMA—would not be able to assert against the GAO any FOIA exemption that it could not make against Congress itself. FEMA, then, would not be able to assert FOIA exemption (b)(5) as a basis for declining to release documents to the GAO in this case.[13]

III.

In sum, although § 102 of the GAO Act does grant the GAO a new authority to enforce its informational requests in court, it does not alter the underlying duties and powers of the executive branch and the GAO respectively with regard to the GAO's statutory right of access to executive branch documents. Further, if the GAO Act operates in the way its proponents intended, the GAO's power to go to court will be invoked only as a last resort in the rare case in which the traditional accommodation between the two branches of government fail. We have no reason to believe, on the basis of the information your Office has supplied us, that this will be such a case.

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[11] *See, e.g.*, 31 U.S.C. §§ 43, 53, 65(d); Reorganization Act of 1949, 63 Stat. 205; Reorganization Act of 1945, 59 Stat. 616.

[12] *See, e.g.*, 1980–81 *United States Government Manual* 55. *See also* W. Willoughby, *The Legal Status and Functions of the General Accounting Office of the National Government* 12–16 (1927); Corwin, *Tenure of Office and the Removal Power*, 27 Colum. L. Rev. 354, 396 (1927).

[13] We are aware of no facts that would throw into question the GAO's statutory authority to conduct the present investigation of FEMA. Nor has any such question been raised by your Office. We note also that, although § 102 of the GAO Act and the FOIA provide no independent statutory bases on which FEMA may decline to release documents to the GAO, the congressional recognition in § 102(b)(3) of the GAO Act of an executive branch interest in protecting its deliberative processes reaffirms the importance of that constitutionally based interest. The executive branch may, in appropriate cases, exercise its constitutional authority to decline to release information in order to safeguard the discharge of its functions. *See generally Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977); *United States* v. *Nixon*, 418 U.S. 683 (1974).

LARRY A. HAMMOND
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Office of Legal Counsel

Litigating Authority of the Regional Fishery Management Councils

The legislative history and general statutory framework of the Fishery Conservation and Management Act of 1976 indicate that Congress did not intend the Regional Fishery Management Councils to have litigating authority independent of the Department of Justice, so as to enable them to challenge in court a decision by the Secretary of Commerce taken under the FCMA and relating to the establishment of the Councils and their functions.

The Councils have neither express statutory authority nor that freedom from executive control that would give rise to some inference supportive of their having independent litigating authority.

The general rule against inter-agency and intra-agency lawsuits arises not only from a desire for centralized control of litigation, but also from the constitutional principle that disputes between entities subject to the control of the President should be resolved within the executive branch.

September 17, 1980

MEMORANDUM OPINION FOR THE GENERAL COUNSEL, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

You have asked this Office whether Regional Fishery Management Councils (Councils), established by the Fishery Conservation and Management Act of 1976 (FCMA), 16 U.S.C. §§ 1801–82, may, on their own behalf, challenge in court a decision by the Secretary of Commerce (the Secretary) taken under the FCMA and relating to the establishment of the Councils and their functions.[1] We have concluded that the Councils do not have independent litigating authority, and cannot, therefore, challenge the Secretary's actions in court.

The FCMA "adopts a somewhat convoluted scheme to achieve its purposes of conservation and management of fishery resources." *Washington Trollers Ass'n* v. *Kreps*, 466 F. Supp. 309, 311 (W.D. Wash. 1979). This is at least in part the result of Congress' desire to effect a compromise between the need for federal control of the nation's marine resources and the states' desire for authority over "their" fish. *See* 122 Cong. Rec. 115 (1976); H.R. Rep. No. 948, 94th Cong., 2d Sess. 50 (1976); H.R. Rep. No. 445, 94th Cong., 1st Sess. 61–62 (1975);

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[1] In your letter you raised two issues. The first, concerning boundaries between adjoining Councils, was addressed in our memorandum to you of December 14, 1979 [3 Op. O.L.C. 464 (1979)].

50 C.F.R. § 601.1 (1979). As originally drafted, this legislation provided that the Secretary and the Councils were to be coordinate authorities:

> The regional Councils are, in concept, intended to be similar to a legislative branch of government. . . . The Secretary of Commerce is given authority under the bill to act as the "executive," with ultimate authority to make decisions about management regulations for the entire nation. . . . Finally, section 204 establishes an appellate body, theoretically comparable to the judicial branch, the Fishery Management Review Board. . . . The concept of an administrative review board of this nature is not new (*i.e.*, the National Labor Relations Board) and will hopefully provide an independent review process with the ease of access and speed of decision that will give confidence to the decisionmaking process.

S. Rep. No. 416, 94th Cong., 1st Sess. 29 (1975). The Board "would have [had] exclusive and original jurisdiction to hear appeals from actions of the Secretary relating to fishery management. The purpose of the Board [was] to provide an independent review procedure for the settlement of disputes arising from the administration of the Act." *Id.* at 38–39.

Two groups could appeal to it:

> (1) Any person who is adversely affected or aggrieved by, or who suffers legal wrong through [a final rule, regulation or decision of the Secretary, and,] . . .
>
> (2) Any Council whose recommended management regulations were determined by the Secretary to be nonconsistent with the national standards . . . .

Id. at 58 (proposed § 204(c)(1), (2)).

This provision was included because the Senate committee believed that:

> It is inevitable that disputes will arise with respect to fishery management decisions. To meet the need for dispute settlement, the bill establishes a Fishery Management Review Board. The Board, an independent quasi-judicial administrative body, would review disputes between the Secretary and the Regional Councils, as well as other disputes relating to fishery management decisions.

Id. at 5. Appeals from the Board to the Court of Appeals could only be brought by a person "who is adversely affected or aggrieved by, or who suffers legal wrong through, a decision of the Board . . . ," *not by a Council. Id.* at 59 (proposed § 204(g)).

The Board, however, did not become a part of the final version of FCMA. The House and Senate, having passed different versions of FCMA, deleted it in conference, stating:

> The implementation process provisions follow comparable provisions in the House bill and the Senate amendment [S. 961], except that . . . (2) the provisions in the Senate amendment establishing a 5-member, President-appointed "Fishery Management Review Board" to determine appeals from regulations promulgated by the Secretary is not included in the conference substitute in favor of judicial review.

H.R. Rep. No. 948, 94th Cong., 2d Sess. 55 (1976). Judicial review under FCMA is in accordance with the Administrative Procedure Act (APA). 16 U.S.C. §1855(d). Review under the APA is available to "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action. . . ." 5 U.S.C. § 702. The legislative history, therefore, indicates that Congress decided not to permit the Councils to challenge the Secretary's decision administratively.

Under the FCMA, the Councils' staff and administrative expenses are funded by Congress, and the disbursement of funds is controlled by the Secretary. 16 U.S.C. § 1852(f)(7). The Secretary appoints a majority of the voting members to their three-year terms. 16 U.S.C. § 1852(b)(3). He provides the guidelines for the fishery management plans, 50 C.F.R. § 602.1 *et seq.*, and has final responsibility for their development, 16 U.S.C. §§ 1854, 1855, and enforcement, 16 U.S.C. §§ 1856(b), 1858, 1861, and for promulgation of regulations. The Councils, on the other hand, have a purely advisory function under the statute. 16 U.S.C. § 1852(h). The Secretary can, if he wishes, develop a plan or implement a set of regulations of which a Council disapproves. 16 U.S.C. §§ 1854(c)(1)(B), (c)(2), 1855(c).

Given this framework, we believe that the Councils lack independent litigating authority. The conduct of litigation involving the United States or one of its agencies [2] is broadly reserved to the Department of

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[2] Agencies include "any department, independent establishment, commission, administration, authority, board or bureau of the United States. . . ." 28 U.S.C. § 451. All of the opinions discussing the Councils' status under various statutes appear to place them in at least one of these categories. *See* Memorandum Opinion for the General Counsel, U.S. Department of Commerce, National Oceanic and Atmospheric Administration (NOAA) from Leon Ulman, Deputy Assistant Attorney General, Office of Legal Counsel, October 14, 1977 [1 Op. O.L.C. 239] (independent establishment under the Federal Tort Claims Act); memorandum for the Deputy General Counsel, Department of Commerce from the Assistant Attorney General, Civil Division, July 12, 1977 (agencies under Federal Tort Claims Act); memorandum for the Deputy General Counsel, NOAA, from a staff attorney, November 30, 1976 (agency under the Administrative Procedure Act); memorandum for the General Counsel, Department of Commerce from the General Counsel, NOAA (same); memorandum for the Acting General Counsel, Department of Commerce from the General Counsel, Office of Management and Budget, March 22, 1977 (statutory advisory committee); memorandum for the General Counsel, NOAA from the Assistant General Counsel, General Services Administration, September 30, 1977 (independent

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Justice. 28 U.S.C. § 516. Without express authorization, an agency or department risks having the court dismiss its suit. *Interstate Commerce Comm'n* v. *Southern Railway Co.*, 43 F.2d 534, 536–38 (5th Cir. 1976); *Federal Trade Commission* v. *Guignon*, 390 F.2d 323, 324 (8th Cir. 1968); *Securities & Exchange Commission* v. *Robert Collier & Co.*, 76 F.2d 939, 940 (2d Cir. 1935); *Sutherland* v. *International Insurance Co.*, 43 F.2d 969, 970–71 (2d Cir.) (L. Hand, J.), *cert. denied*, 282 U.S. 890 (1930).[3] Under the FCMA itself, for example, the Secretary must refer civil penalty and forfeiture proceedings to the Attorney General for enforcement. 16 U.S.C. §§ 1858(c), 1860(b)(c). In enacting the FCMA, Congress considered—and rejected—a statutory scheme that would have permitted the Councils to challenge before an administrative body the Secretary's final decision. Congress knows how to draft a statute that would allow an agency to challenge a final order of another agency.[4] In the absence of any such express statutory authority, the Councils may not litigate against anyone, including the Secretary.[5] This will certainly *not* prevent states or individual council members from challenging the Secretary so long as they have standing to do so. *See*, *State of Maine* v. *Kreps*, 563 F.2d 1043, 1045 n.1 (1st Cir. 1977). This reading of the Councils' authority also is consistent with the general principle that statutes should be construed so as to avoid doubts regarding their constitutionality, *see generally*, *Kent* v. *Dulles*, 357 U.S. 116 (1958). As discussed below, construing the Councils to have such authority would raise a substantial constitutional question.

This general rule against inter- and intra-agency lawsuits arises not only from a desire for centralized control of litigation but also from the

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establishment); memorandum for the General Counsel, NOAA from the Solicitor of Labor, October 19, 1979 (wholly owned instrumentality of the United States under the Social Security Act and Federal Employees' Compensation Act); memorandum for the Department of Commerce from the Chief, Wage, Excise and Administrative Provisions Branch, Internal Revenue Service, November 22, 1977 (wholly owned instrumentality under Federal Insurance Contributions Act). *But cf.* memorandum for the Assistant Secretary for Administration, Department of Commerce from the Acting General Counsel, United States Civil Service Commission, August 3, 1976 (public members not federal employees).

[3] *See The Gray Jacket*, 72 U.S. (5 Wall.) 370, 371 (1866); 5 U.S.C. § 3106; Exec. Order No. 12,146, § 1-4, *reprinted in* 28 U.S.C. § 509 App. at 1162 (Supp. III 1979); Exec. Order No. 6,166, § 5 (1933), *reprinted in* 5 U.S.C. §§ 124–32 App. at 159 (1964); P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart & Wechsler's The Federal Courts & the Federal System 1315–20 (2d ed. 1973 & 1977 Supp.).

[4] Under the Federal Coal Mine Safety Act of 1952 (the Act), for example, Congress set up a Coal Mine Safety Board of Review (the Board). 30 U.S.C. § 475 (1964). The Board could overrule decisions made by the Director of the United States Bureau of Mines. 30 U.S.C. § 477(a) (1964). The Act specifically provided, however, that the Director could then challenge any final order of the Board in the Court of Appeals. 30 U.S.C. § 478(a) (1964) ("upon the filing in such court of a notice of appeal by the Director . . . .") *See Director, United States Bureau of Mines* v. *Princess Elkhorn Coal Co.*, 226 F.2d 570 (6th Cir. 1955); *Director, United States Bureau of Mines* v. *Three Fork Coal Co.*, 222 F.2d 425 (4th Cir. 1955) (appeal dismissed as untimely). The Board was eliminated under the Federal Coal Mine Health and Safety Act of 1969. S. Rep. No. 411, 91st Cong., 1st Sess. 38 (1969). Instead, Congress substituted "traditional administrative and judicial procedures." *Id.* at 37–38. *See* 30 U.S.C. § 816(a)(1) (Supp. III 1979). *See also* Klaus, *The Taft-Hartley Experiment in Separation of NLRB Functions*, 11 Indus & Lab. Rel. Rev. 371 (1958).

[5] *See Lee* v. *Civil Aeronautics Board*, 225 F.2d 950, 951–52 (D.C. Cir. 1955); Davis, *Standing of a Public Official To Challenge Agency Decisions: A Unique Problem of State Administrative Law*, 16 Ad. L. Rev. 163, 167, 168 (1964).

constitutional structure of our government. Disputes between parts of the executive branch, each of which is ultimately responsible to the President, should be resolved within the executive branch. *See* Executive Order No. 12,146, § 1–4, *reprinted in* 28 U.S.C. § 509 App. at 1162 (Supp. III 1979). Independence of an agency from the executive's supervisory control may overcome this presumption.[6] The Councils, however, have neither express statutory authority nor that freedom from executive control that would give rise to some inference supportive of their having independent litigating authority. However independent the Councils may be in their day-to-day operations, ultimate authority over a majority of their membership,[7] budgets,[8] and their major area of concern—the fishery management plans—remains with the Secretary or other federal agencies. The Councils perform the basic research, hold hearings, draft the plan for their area, and propose regulations. 16 U.S.C. §§ 1852(h), 1853(c). It is the Secretary, however, to whom the drafts and proposals are submitted and it is the Secretary who either approves the management plan or amends it to his satisfaction. 16 U.S.C. § 1854. *See State of Maine* v. *Kreps*, 563 F.2d 1052, 1055–56 (1st Cir. 1977). It is also the Secretary who reviews the regulations to insure their legality and who implements them. 16 U.S.C. § 1855(c). That the Department of Commerce has found it most efficient to allow the Councils maximum leeway, *see* 50 C.F.R § 601.1 (1979), does not change an analysis based on the statutory framework. The Councils are subordinate parts of the Department of Commerce. Any attempt on their part to sue the Secretary would therefore raise a substantial constitutional question.

We believe that the Councils are a part of the Department of Commerce and subject to its overall control. In the absence of specific contrary legislation, they must be represented in any court proceeding by the Secretary's lawyer, the Attorney General. Since the Councils cannot go into court without the Attorney General, the Councils have no authority to bring suit on their own behalf to challenge a decision by the Secretary taken under FCMA and relating to the establishment of the Councils or their functions.

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[6] *See United States* v. *Nixon*, 418 U.S. 683, 694–95 (1974); *Federal Maritime Board* v. *Isbrandtsen*, 356 U.S. 481 (1958); *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954); *Chapman* v. *FPC*, 345 U.S. 153 (1953); *ICC* v. *Jersey City*, 322 U.S. 503 (1944); *United States* v. *ICC*, 221 F. Supp. 584 (D.D.C. 1963); *Benson* v. *United States*, 175 F. Supp. 265 (D.D.C. 1959); *United States* v. *ICC*, 142 F. Supp. 741 (D.D.C. 1956).

[7] The Secretary appoints a majority of the voting members from lists submitted by each state's governor. 16 U.S.C. § 1852(b)(1)(B). The nonvoting members represent various federal agencies. 16 U.S.C. § 1852(c). Whether the Secretary may freely remove the voting members whom he appoints, 16 U.S.C. § 1852(b)(1)(C), need not be decided. It appears, however, that the Councils' functions are primarily executive, not legislative or judicial. *Wiener* v. *United States*, 357 U.S. 349, 351–53 (1958); *Lewis* v. *Carter*, 436 F. Supp. 958, 961 (D.D.C. 1977).

[8] The Secretary pays for the Councils' necessary staff and administration. 16 U.S.C. § 1852(f)(7).

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Environmental Protection Agency Overflights and Fourth Amendment Searches

Routine overflights of industrial plants by the Environmental Protection Agency (EPA), conducted at lawful altitudes and employing commercially available visual aids, do not constitute searches under the Fourth Amendment.

Considering the comprehensive nature of the federal environmental regulatory scheme, corporate businesses may have no legitimate expectation of privacy against EPA observations for the purpose of detecting emissions into the air or discharges into water.

September 23, 1980

MEMORANDUM OPINION FOR THE DEPUTY ATTORNEY GENERAL

This responds to your request for our views on the question whether the Environmental Protection Agency's (EPA's) routine overflights of possible sources of pollution constitute searches under the Fourth Amendment. This question is addressed in a draft memorandum prepared by the EPA and submitted to the Land and Natural Resources Division of the Department of Justice. The EPA memorandum states that routine overflights of possible sources of unlawful pollution are an important part of its overall enforcement program. Aerial observations are used to detect discharges into water, emissions into the air (especially at night), and hazardous waste disposal sites among other things. Flights are typically made at altitudes meeting FAA regulations, and observations are made with equipment that includes infrared cameras (to detect heat differentials caused by underground discharges into water) and an instrument called the "Enviro-Pod," which is essentially equivalent to a high-quality single lens reflex 35mm camera with good lenses. Such cameras, as well as the thermal infrared scanner, are commercially available.

The EPA memorandum concludes that the overflights do not constitute searches as long as they occur at lawful and reasonable altitudes and use equipment no more sophisticated than commercially available equipment and as long as the observed facility has not taken measures to shield itself from overhead observation.[1] For the reasons that follow, our analysis agrees that the EPA memorandum is substantially correct.

I.

The governing standard for whether an observation constitutes a search under the Fourth Amendment was established in *Katz* v. *United States,* 389 U.S. 347 (1967), in which the Supreme Court rejected the requirement that a physical intrusion occur before a search could be found and held that attaching an electronic listening device to the outside of a public telephone booth constituted a search.

> What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.

Id. at 351–52. A governmental observation of an individual constitutes a search whenever it "violate[s] the privacy upon which he justifiably relie[s]." *Id.* at 353. As explained by Justice Harlan, this rule contains "a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id.* at 361 (Harlan, J., concurring).

In *United States* v. *Chadwick,* 433 U.S. 1 (1977), the Supreme Court characterized the Fourth Amendment as protecting people "from unreasonable government intrusions into their legitimate expectations of privacy." *Id.* at 7. In *Rakas* v. *Illinois,* 439 U.S. 128 (1978), the Court read *Katz* as holding that

> capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.

Id. at 143. The Court explained in a footnote that

> a "legitimate" expectation of privacy by definition means more than a subjective expectation of not being discovered. . . . Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal prop-

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[1] A memorandum from the Drug Enforcement Administration (DEA) concurs in these conclusions. The DEA memorandum actually goes farther than the EPA in its conclusions, cursorily arguing that even attempts to shield objects or activity from aerial view would not create a reasonable expectation of privacy that would make aerial observation of those objects or activities that were in fact unconcealed a search for Fourth Amendment purposes.

> erty law or to understandings that are recognized and permitted by society.

Id. at 143–44 n.12. Because flights at lawful altitudes do not invade a landowner's property *(see United States* v. *Causby,* 328 U.S. 256 (1946); 49 U.S.C. § 1508 (1976)), the inquiry regarding EPA overflights is whether societal understandings recognize a legitimate expectation of privacy against aerial viewing of a commercial facility for the purpose of detecting unlawful pollution.

II.

As both the EPA memorandum, and the DEA memorandum mentioned in note 2 *supra,* point out, there are no federal cases on the question of whether an aerial observation can constitute a search for Fourth Amendment purposes. Two Supreme Court decisions, however, are especially relevant to the EPA overflight search question.

In *G.M. Leasing Corp.* v. *United States,* 429 U.S. 338 (1977), the Supreme Court unanimously held that corporations are protected by the Fourth Amendment. (The Court had earlier held that Fourth Amendment guarantees apply to businesses as possible subjects of regulatory searches. *Camara* v. *Municipal Court,* 387 U.S. 523 (1967); *See* v. *City of Seattle,* 387 U.S. 541 (1967).) The decision recognized that "a business, by its special nature and voluntary existence, may open itself to intrusions that would not be permissible in a purely private context." 429 U.S. at 353. The Court has yet to elaborate the contours of corporations' reduced protection.[3]

Because the governmental action challenged in *G.M. Leasing* was a physical entry, the Court did not address the question of what constitutes a search. Rather, it held that the intrusions, acknowledged to be searches for constitutional purposes, were not reasonable, distinguishing *United States* v. *Biswell,* 406 U.S. 311 (1972) (warrantless search of locked storeroom of a federally licensed gun seller, pursuant to inspection procedure authorized by Gun Control Act of 1968, held constitutional). The Court decided that where the intrusion was undertaken to enforce the tax laws against the corporation and "was not based on the nature of its business, its license, or any regulation of its activities," the corporation had Fourth Amendment rights identical to those of an individual. 429 U.S. at 354. In accordance with *Marshall* v. *Barlow's,* 436 U.S. 307 (1978) and *Biswell, supra,* these elements may serve to justify warrantless EPA overflights as reasonable, given the specific enforcement needs in environmental regulation, even if they are held to constitute searches.[3] More important for the question whether the flights are searches, these elements may be looked to in defining the legitimate expectations of privacy of the corporation's activities. Considered in the context of the detailed environmental regulatory scheme, corporate businesses—especially those operating industrial facilities—may have no legitimate expectation of privacy against EPA observations for the purpose of detecting emissions into the air or discharges into water. It might easily be found that emissions into the air and discharges into water visible from public locales are "knowingly expose[d] to the public." *Katz*, 389 U.S. at 351.

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[3] The EPA memorandum refers to *Clinton Community Hospital Corp.* v. *Southern Maryland Medical Center,* 374 F. Supp. 450, 456 (D. Md. 1974), in which the court asserted that corporations have no right to privacy under the Fourth Amendment. As the memorandum points out, the court relied on *United States* v. *Morton Salt Co.,* 338 U.S. 632 (1950); but that case was decided long before the Supreme Court first expressly rejected (in *G.M. Leasing*) the position that corporations have no Fourth Amendment privacy protection.

In *Air Pollution Variance Board* v. *Western Alfalfa Corp.*, 416 U.S. 861 (1974), the second Supreme Court case of special relevance to the EPA overflight search question—decided before *G.M. Leasing*—the Supreme Court unanimously held that the respondent corporation had not been the subject of a search when, in daylight, a state health department inspector entered the outdoor premises of the corporation's plant and observed the plant's smoke stacks in order to check for pollution. Having neither entered the plant or offices, nor inspected the stacks, the official "had sighted what anyone in the city who was near the plant could see in the sky—plumes of smoke." *Id.* at 865. The Court reaffirmed the rule of *Hester* v. *United States*, 265 U.S. 57 (1924), that Fourth Amendment rights do not extend to "sights seen in 'the open field.' " Because the public could enter the premises on which the inspector stood, the observation fell within the "open fields" exception to the Fourth Amendment.

This case is significant because it unanimously held there to be no search when (1) from an "open field," which the public could routinely enter, officials observed (2) publicly visible emissions from (3) a corporation's plant (4) in order to detect pollution. If aerial observation from lawful altitudes is constitutionally equivalent to observation from the open fields—and the Court's emphasis on the observer's distance from the plant, on the fact that the public was not excluded from the observer's position, and on the analogy to taking noise readings while standing on a railroad right-of-way suggests that it is—then EPA overflights would be exempt from Fourth Amendment requirements under the open fields exception.[4] This case presents a strong precedent, which any corporation arguing that overflights of its plants are searches would have to overcome.[5] Nevertheless, each case must be considered

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[3] This memorandum does not consider the issue whether a warrantless overflight, if held to be a search, would be constitutional.

[4] Lower court precedent suggests that the use of viewing equipment that is not of extreme technological sophistication would not change this conclusion. *See* discussion *infra*.

[5] It is worth noting that the United States, as amicus curiae in the case, submitted a brief that presented exactly the arguments that the decision advances. It is also worth noting that on remand, the Colorado courts held that due process did not require notice prior to inspection but did require notice

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on all its facts to determine whether in the particular circumstances, a legitimate expectation of privacy has been invaded.[6]

III.

Because whether a legitimate expectation of privacy has been invaded depends on the full set of circumstances, it is useful to describe the several state court aerial observation decisions before attempting to catalogue the relevant factors for answering the Fourth Amendment question. Generalization is especially difficult with these cases.

In *People* v. *Sneed,* 32 Cal. App. 3d 535, 108 Cal. Rptr. 146 (Ct. App. 1973), a police helicopter hovered at 20–25 feet over defendant's corral near the back of his house on his ranch. Several marijuana plants growing in the corral were spotted; though they were hidden from public view, they may have been visible from the neighbor's farm. The court found there to be a search, saying that in considering the totality of circumstances, it must look to the location of the premises (urban or isolated), the natural or artificial barriers to public observation, the location of public walkways or roads, and the type of governmental authority. Relying on the rule of *Harris* v. *United States,* 390 U.S. 234, 236 (1968), that a non-search observation requires the officials lawfully to be at their vantage point, the court noted that the helicopter altitude was unlawful and that there was no evidence of regular flights (by police, by cropdusters, by mosquito-abatement officials, for example) over defendant's ranch. Defendant's privacy had therefore been invaded.

In *Dean* v. *Superior Court,* 35 Cal. App. 3d 112, 10 Cal. Rptr. 585 (Ct. App. 1973), defendant had cultivated marijuana on a ¾-acre plot protected from public view by the surrounding hills and forest. Using binoculars, police flew as low as 300 feet over the plot. The court found that no search had occurred. It reasoned that altitude is a minor factor in determining legitimate expectations of privacy; instead, one must look to "mankind's common habits in the use of domestic and business property." 35 Cal. App. 3d at 117. Here, any expectation of privacy was "not consistent with the common habits of mankind in the use of agricultural and woodland areas." *Id.* at 118.

In *People* v. *Superior Court,* 37 Cal. App. 3d 836, 112 Cal. Rptr. 764 (Ct. App. 1974), police, while conducting a routine air patrol at approximately 500 feet above ground, and first using the naked eye, then

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very soon afterward, at least when the inspections were to be used in a hearing before the Air Pollution Variance Board. *Air Pollution Variance Board* v. *Western Alfalfa Corp.,* 553 P.2d 811 (Colo. S. Ct. 1976).

[6] Though the *Air Pollution Variance Board* opinion does not cite *Katz,* the issues presented in the two cases were the same, namely, an observation constituted a search for Fourth Amendment purposes. Because the Court has read this question as an inquiry into legitimate expectations of privacy, the open fields doctrine should be understood as holding that there are no legitimate expectations of privacy against viewing from an open field, or indeed, from anywhere the observer has a right to be.

20-power gyrostabilized binoculars, spotted large, "conspicuous and readily identifiable" automobile parts in the backyard of a residence. 37 Cal. App. 3d at 839. In these circumstances, no search had occurred.

In *Plunkett* v. *City of Lakewood*, 2 Civ. 49610 (unreported decision filed 15 November 1977, Cal. Ct. App., 2d Dist.) *cert. denied*, 436 U.S. 945 (1978), city officials' helicopter overflight of plaintiff's property, and taking of photographs from that vantage point, was held not to constitute a search. The available reports of the facts reveal no further details.

In *State* v. *Stachler*, 570 P.2d 1323 (Haw. S. Ct. 1977), no search was found where police flew over defendant's woods-surrounded marijuana during routine helicopter surveillance and using binoculars from about 300 feet, spotted the marijuana growing in the open field. The court relied on the open field exception approved in *Air Pollution Variance Board*, noting that the police were flying at a lawful and reasonable altitude. The court observed, however, that a violation of legitimate expectations of privacy might be found if the overflight were unreasonably or unlawfully low, or if surveillance were intensive or amounted to harassment, or if "highly sophisticated viewing devices" were employed. *Id.* at 1328. Here, occasional overflights by cropdusters, commercial planes, and helicopters made any expectation of privacy in the open field unreasonable.

In *State* v. *Brighter*, 589 P.2d 527 (Haw. S. Ct. 1979), helicopter observation from 200–250 feet resulting in the spotting of a stolen automobile van was held not to constitute a search. The court said: "No reasonable expectation of privacy can be asserted with respect to an object or activity which is open and visible to the public when the presence of members of the public may reasonably be anticipated." *Id.* at 530.

In *Burkholder* v. *Superior Court*, 96 Cal. App. 3d 421, 158 Cal. Rptr. 86 (Ct. App. 1979), police, flying in a plane at 1500–2000 feet and using 7 × 50mm binoculars and a camera with a 135mm telephoto lens, discovered a marijuana patch fairly well-hidden in the woods. Relying on the *Dean* agricultural-use test, and distinguishing *Sneed* on the ground that that case involved a "purposeful and intensive (helicopter) overflight at an unreasonable and unlawful altitude (20 feet) during a random search for contraband" (96 Cal. App. 3d at 426), the court held that no search had occurred. The optical aids were permissible, said the court, because the patch could be seen without the aids, albeit in less detail.

Finally, in *People* v. *Lashmett*, 389 N.E.2d 888 (Ill. App. Ct. 1979), police, acting on a tip, flew at 2400 feet over defendant's farm and spotted allegedly stolen large farm equipment. In this first Illinois overflight case, the court found that no search had occurred.

IV.

The cases suggest that in determining whether a legitimate expectation of privacy has been invaded by aerial observation, a court would look to several factors: the altitude of the observer, the type of location viewed, the nature of the objects or activities observed, the extent to which the area observed was concealed, the equipment used for observation, and the frequency of flights over the observed area. In no case is a finding as to any one of these elements conclusive, although an extension of the open fields exception to the public airways would render altitude a conclusive test.

Altitude. Only the *Sneed* case, in which the helicopter hovered directly over the observed property at 20-25 feet and caused a very noisy disturbance, held an aerial observation to be a search. The other cases reached the opposite conclusion; in all of them, the flights were at lawful and reasonable altitudes ranging from 200-2400 feet. EPA overflights occur at lawful altitudes, but altitude is not determinative of the reasonableness of privacy expectations. *Dean; Stachler.*

In our view, because of the difficulty of protecting against aerial observation, it is unlikely that a court would adopt the general rule that observations from public airspace, like those from a public road, fall within the open field exception. Without such a blanket exception, the other elements noted by courts will continue to inform decisions about the legitimacy of privacy expectations.

Type of Location. The relevance of the type of location viewed was explained by a federal court in a case involving FBI agents peering through a gap in boards covering a garage window facing a public alley. In *United States* v. *Vilhotti*, 323 F. Supp. 425 (S.D.N.Y. 1971), the court said:

> [A]n agent is permitted the same license to intrude as a reasonably respectful citizen would take. Therefore, the nature of the premises inspected—*e.g.*, whether residential, commercial, inhabited, or abandoned—is decisive; it determines the extent of social inhibition on natural curiosity and, inversely, the degree of care required to insure privacy.

Id. at 431. Although "decisive" is in our opinion too strong a characterization, the nature of the premises is critical to the legitimacy of privacy expectations. A residence or its backyard (*Sneed*) is socially understood to give greater protection against outside intrusion than is a farm or business (*Dean*; *Lashmett*). Looking into a building is far more likely to be held a search than is observing objects or activities on the outside. *See United States* v. *Kim*, 415 F. Supp. 1252 (D. Haw. 1976) (telescope looking into apartment a search; observing balcony may not be search). As indicated by the Supreme Court in *G.M. Leasing*, businesses receive less protection from the Fourth Amendment than do private residences. An industrial facility whose exterior is viewed from overhead by the EPA can claim little legitimate expectation of privacy consistent with "mankind's common habits in the use of . . . business property." *Dean*, 35 Cal. App. 3d at 117.

Nature of Objects or Activities Observed. Although the nature of the premises is an important measure of the extent of social inhibition on public curiosity, the kind of objects or activities being observed also determines in part the legitimacy of privacy expectations. In particular, if the objects or activities are large or conspicuous, any expectation of privacy with respect to those objects or activities is less reasonable. *People* v. *Superior Court; Lashmett*. Because material discharged into water or emitted into the air is publicly visible, an expectation of privacy with respect to these discharges and emissions would be of doubtful legitimacy.

Concealment. The extent to which the observed area is concealed, either by natural barriers such as hills, woods, grass, or crops or by artificial barriers such as a fence, is an important factor in determining the reasonableness of any expectations of privacy. Under the *Katz* principle that observation of what a person knowingly exposes to the public does not constitute a search, leaving objects or activities visible to public walkways (*Sneed*) or to public roads (*Stachler*) or to any place where "the presence of members of the public may reasonably be anticipated" (*Brighter*, 589 P.2d at 530) evidences an absence of reasonable expectations of privacy. Conversely, efforts to conceal make expectations of privacy more reasonable. *See State* v. *Kender*, 588 P.2d 447 (S. Ct. Haw. 1979) (small marijuana plants hidden among tall grass in yard surrounded by fence; observation from top of fence using telescope constitutes search).

What remains unclear is whether expectations of privacy are reasonable when efforts to conceal extend only to landbound observers, not to overflights. The list of considerations advanced by the *Sneed* court is directed far more at concealment from landbound observers; moreover, the *Dean* court said that the horizontal extension of an activity is a better measure of its privacy protection than is the altitude of the overhead plane. None of the cases involve efforts to conceal from overhead observation. The EPA memorandum and the DEA memorandum regard concealment from land observation as insufficient to create a reasonable expectation of privacy against overhead inspection. LaFave, by contrast, argues that such concealment should be sufficient. 1 LaFave, Search and Seizure § 2.3, at 328–30 (1978). The holdings of the cases summarized above, however, lead us to the conclusion that the significance of efforts to conceal from landbound observers depends on the nature of the premises, the type of objects or activities observed, and the other factors discussed here. We conclude that an industrial facility should have little expectation of privacy from overhead observation of the exterior of its plant or of the land surrounding it, even if a fence surrounds the facility to keep intruders out. By contrast, surrounding the backyard of a residence with a fence should be sufficient to raise legitimate expectations of privacy against prying overhead observation (*i.e.*, from low altitudes). This judgment rests, as the cases direct, on the general social understanding about the nature of the objects or activities that can reasonably be expected to be shielded when located on particular kinds of premises. Concealment must therefore be considered only one of the factors relevant to determining the legitimacy of expectations of privacy.

Observation Equipment. The use of some visual aids does not automatically transform into a search what would otherwise not be a search. For example, binoculars were approved in ***Burkholder, Dean, People*** v. ***Superior Court,*** and ***Stachler.*** Moreover, use of a camera does not transform a non-search into a search. *See, e.g.,* ***Plunkett, Burkholder, United States*** v. ***McMillon,*** 350 F. Supp. 593 (D.D.C. 1972). ***Burkholder*** even approved the use of a telephoto lens on the camera. In addition, ***Stachler*** warned that a search might be held to have occurred if technologically sophisticated equipment were used. It is our conclusion that no reasonable expectations of privacy are defeated by the use of commercially available visual aids that do no more that provide greater detail than the naked eye can make out on unconcealed objects or activities.[7]

In addition, if an observation would not constitute a search if carried out in daylight, using artificial illumination to observe in the dark would not render it a search. ***See United States*** v. ***Lee,*** 274 U.S. 559 (1927) (use of searchlight to observe boat at night not a search), cited in *Katz* v. *United States, supra* (supporting proposition that what a person knowingly exposes to the public gains no Fourth Amendment protection). If darkness does not generate a legitimate expectation of privacy against artificial illumination, it should not shield objects or activities against observation with the aid of "see-in-the-dark" equipment. ***See Commonwealth*** v. ***Williams,*** 396 A.2d 1286 (Pa. Super. Ct. 1978) (use of see-in-the-dark "startron" does not constitute search). Therefore, nighttime overhead observation of the unconcealed exterior of suspected sources of pollution, using infrared equipment to detect emitted heat or otherwise to observe without illumination, or using binoculars and cameras with commercially available lenses, should not constitute a search.

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[7] On facts similar to those in *United States* v. *Kim, supra,* a federal court recently found a search in the use of a "high-powered telescope (*i.e.,* a Monolux #4352 telescope with a 22mm viewer)" to observe the inside of an apartment. *United States* v. *Taborda,* 491 F. Supp. 50, 51 (E.D.N.Y.). Both cases involve an invasion of residential privacy, though some language in *Taborda* suggests that the court envisions a general rule that use of visual aids constitutes a search. In light of such cases as *United States* v. *Grimes,* 426 F.2d 706 (5th Cir. 1970) (binoculared observation of street activity not a search), this reading of *Taborda* would be too broad.

The use of infrared equipment to detect underground discharges—which might be considered concealed from ordinary public observation—is more questionable. Use of magnetometers, x-rays, radiographic scanners, or scintillators to perceive concealed objects constitutes a search. *See, e.g., United States* v. *Epperson,* 454 F.2d 769 (4th Cir. 1972) (magnetometer use is search). Nevertheless, the decisions on this aspect of search law—indeed all the federal decisions relevant to the significance of visual aids—all concern the invasion of bodily privacy (as with the magnetometer at airports) or residential privacy (*Kim; Kender*). It is therefore difficult to predict the extent of privacy protection that surrounds underground discharges.

Visual aids have generally been approved as sense-enhancement devices; when an instrument is used to detect what to the observer's senses is undetectable, a search is likely to have occurred. *See United States* v. *Bronstein,* 521 F.2d 459, 465 (2d Cir. 1975) (Mansfield, J., concurring). The technology used by the EPA in its searches should be evaluated in light of this standard, but it is only one factor in determining the range of legitimate privacy expectations, which are defined as well by the nature of the premises, of the objects being observed, and the like. In this context, we conclude, detection of heat differentials in unconcealed pools of water should violate no legitimate expectations of privacy. Indeed, it is likely that, faced with the issue, courts would recognize the scientific sophistication of industrial businesses and decline to draw a line between use of the human senses and use of devices able to perceive signals other than light, sound, etc., within the human range. This would represent a sensible extension of the approval of see-in-the-dark devices. As briefly described in the EPA memorandum, therefore, use of the overflight detection equipment, in observing those facilities technologically sophisticated enough to understand what signals (*e.g.*, light, heat) are being emitted for possible perception, should not constitute a search.

Frequency of Overhead Flights. Not surprisingly, the legitimacy of expectations of privacy against overhead flights depends on the frequency of such flights. *See Sneed, People* v. *Superior Court, Stachler, Burkholder.* Routine flyovers by commercial aircraft or by police planes or helicopters render unreasonable any expectations of privacy with respect to objects or activities left open for viewing by these potential observers. Thus, the more routine the EPA flights, and the greater the air traffic above any observed plant, the less likely is the finding of a search.

V.

Under the *Katz* test, all the circumstances of an observation must be considered before deciding whether it constitutes a search. It is our conclusion that routine EPA overflights of industrial plants, conducted at lawful altitudes and employing commercially available visual aids to detect unconcealed discharges into water or air by observing the exteriors of buildings and open lands, do not constitute searches under the Fourth Amendment. In these circumstances, the state court decisions, the few relevant federal court decisions, and especially *Air Pollution Variance Board* indicate that expectations of privacy are not reasonable. Varying any of these circumstances, as the analysis above suggests, might require a different result.

LARRY A. HAMMOND
Deputy Assistant Attorney General
Office of Legal Counsel

Federal Bureau of Investigation Authority to Investigate a Killing in the Virgin Islands

Under 28 U.S.C. § 533(3), the Federal Bureau of Investigation (FBI) has authority to conduct an investigation of any "official matters under the control of the Department of Justice." Since, under 48 U.S.C. § 1617, the United States Attorney for the Virgin Islands is empowered to prosecute serious offenses against local law, including murder, the murder of an immigration judge in the Virgin Islands is within the FBI's investigative jurisdiction.

October 2, 1980

MEMORANDUM OPINION FOR THE SPECIAL ASSISTANT TO THE ATTORNEY GENERAL

Your inquiry concerning the authority of the Federal Bureau of Investigation (FBI) to investigate the killing of an immigration judge in the Virgin Islands has been forwarded to me for response.

In our view, the FBI does have the power to investigate this matter if authorized by the Attorney General to assist the U.S. Attorney for the Virgin Islands in the execution of his duties. Under 28 U.S.C. § 533(3), the Attorney General may appoint agents

> to conduct such other investigations regarding official matters under the control of the Department of Justice . . . as may be directed by the Attorney General.

The question is therefore whether an investigation into the killing of an immigration judge would concern an "official matter[ ] under the control of the Department of Justice."

Under 48 U.S.C. § 1617, the U.S. Attorney for the Virgin Islands is empowered to prosecute all offenses against the laws of the Virgin Islands which are cognizable in United States District Court there. Under 48 U.S.C. § 1612, the district court has jurisdiction over offenses against local law, exclusive jurisdiction over which is not conferred on the inferior courts. Section 1613 of that title provides that the inferior courts shall have exclusive criminal jurisdiction only over minor offenses involving a maximum fine of $100 or imprisonment for six months, or both. Hence, the U.S. Attorney for the Virgin Islands has statutory jurisdiction to prosecute all more serious offenses. Although by local agreement his duty to prosecute crimes under Virgin Islands law is limited to felonies punishable by at least a five-year sentence, an investigation into the possible murder of an immigration judge satisfies this condition.

The U.S. Attorney is an officer in the Department of Justice and hence subject to the direction of the Attorney General (*see* 28 U.S.C. § 519).The investigation of this incident could lead to a prosecution within the jurisdiction of the U.S. Attorney. The investigation can therefore properly be regarded as an "official matter[ ] under the control of the Department of Justice." Accordingly, quite apart from any possible violations of federal law, the FBI can legally undertake an investigation if authorized to do so by the Attorney General to assist the U.S. Attorney.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

Presidential Authority to Control Export of Hazardous Wastes Under the Export Administration Act of 1979

The Export Administration Act of 1979 gives the President authority to impose controls on the export of hazardous wastes.

Under the 1979 Act, the term "export" includes transactions that have substantial economic consequences, even if they do not directly produce revenue by sales.

October 2, 1980

MEMORANDUM OPINION FOR THE ACTING LEGAL ADVISER, DEPARTMENT OF STATE

This responds to your request for our opinion whether the Export Administration Act of 1979, Pub. L. No. 96–72, 93 Stat. 503, 50 U.S.C. App. § 2401 (Supp. III 1979), applies to the export of hazardous wastes. The request comes in light of our memoranda for you of April 11, 1980, and of January 30, 1979, finding that the Act provides authority for the President to control the export of hazardous substances.* We now conclude that the Act is equally applicable to the export of hazardous wastes.

Our prior memoranda emphasized the broad range of foreign policy purposes to be served by the executive power to control exports. Our April 11, 1980, memorandum particularly noted the statement in the report of the conference committee that the President's authority to restrict exports " 'to further significantly the foreign policy of the United States . . .' encompasses the full range of U.S. foreign policy goals." H.R. Rep. No. 482, 96th Cong., 1st Sess. 43 (1979) (hereinafter 1979 Conference Report) (quoting § 3(2)(B) of the Act, 50 U.S.C. App. § 2402(2)(B)). These goals are the same for export of all hazardous materials, hazardous substances and hazardous wastes alike. Each implicates United States relations with foreign countries because of the danger to health and safety not only in the importing country but also, because of the very nature of the materials, in other countries as well. For example, if improperly handled, hazardous wastes could enter the air or water supply and from there contaminate the proximate and perhaps the world environment. Even proper handling is no guarantee of sufficient containment of wastes that will be deadly for centuries to

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*Note: The text of the April 11, 1980, memorandum appears in this volume at p. 568, *supra*. Ed.

come. Contamination in the importing country of goods which are subsequently exported could be similarly hazardous to other countries. It is thus appropriate for our foreign policy to demonstrate our concern for the risks attendant to export of hazardous wastes as well as hazardous substances.

Nor do the definitions of the objects of export controls indicate that hazardous substances and hazardous wastes should be treated differently. Section 6(a) of the Act authorizes the President to prohibit or curtail the exportation of any "goods" in pursuit of foreign policy purposes. 50 U.S.C. App. § 2405(a). As defined in § 16(3), "good" includes any "article, material, supply or manufactured product." 50 U.S.C. App. § 2415(3). Just as we earlier concluded that the breadth of this definition indicated that hazardous substances were included, it is our opinion that it is broad enough to include hazardous wastes as well.

The difference between hazardous substances and hazardous wastes lies not in the foreign policy ramifications of export or in the categories of goods subject to control. The only difference is in the export process itself. Hazardous substances are exported by sales to the importing country, and the sales produce direct revenue just as do sales of nonhazardous goods. By contrast, exports of hazardous wastes are not directly revenue producing. Instead, the material is exported by payment to the importing country. The language and the legislative history of the Export Administration Act, however, reflect congressional concern about revenue production through exports. For example, § 2(2) of the Act states the finding by Congress that

> "[e]xports contribute significantly to the economic well-being of the United States and the stability of the world economy by increasing employment and production in the United States, and by strengthening trade balance and the value of the United States dollar, thereby reducing inflation. The restriction of exports from the United States can have serious adverse effects on the balance of payments and on domestic employment. . . ."

50 U.S.C. App. § 2401(2).

The 1979 conference report explained: "[A] large trade deficit weakens the value of the dollar, intensifies inflation, and heightens world economic instability; that poor export performance contributes to the trade deficit; . . . [and] it is in the national interest to place a high priority on exports. . . ." 1979 Conference Report at 43. Because of the procedure of exporting wastes by payments, the question arises whether the Act applies to those exports which are not directly revenue producing.

The Act itself does not define "export." The broad purposes of the Act, however, suggest that a restrictive interpretation would not be appropriate. It may be that exports of hazardous wastes do not directly produce revenue by sales. Yet it is clear that shipment is sought because of the economic advantage to the exporter, an advantage through less costly disposal of waste materials, which would affect the United States economy in many of the same ways as does revenue production by export. To exclude from the concept of "export" transactions with these substantial economic consequences would frustrate the legislative desire for a consistent and careful export policy.

Certain of the criteria identified in § 6(b) of the Act, 50 U.S.C. App. § 2405(b), for consideration in imposing export controls are concerned with concepts associated with direct revenue production; but this emphasis does not require that the definition of "export" be similarly limited. Even to the extent that these criteria might not be strictly applicable, as phrased, to the export of hazardous wastes, the variance in terminology indicates no intent to limit executive power; for Congress explicitly recognized that not all criteria would be applicable in all cases. In our memorandum of April 11, 1980, we said, "[T]his provision [§ 6(b)] 'did not establish criteria to be met but factors to be considered, and recognized that the President, having considered them, might find one or more of the factors irrelevant to a decision to impose or remove controls,' " quoting S. Rep. No. 169, 96th Cong., 1st Sess. 8 (1979). *See also* 125 Cong. Rec. 19,937 (1979) (Statement of Senator Stevenson on introducing S. 737); H.R. Rep. No. 200, 96th Cong., 1st Sess. 20 (1979). Thus we find in the Act sufficient flexibility to authorize the President to impose controls on the export of hazardous wastes.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

Government Lawyers' *Pro Bono* Activities in the District of Columbia

Attorneys employed by the federal government are barred by 18 U.S.C. § 205 from participating in any case in which the District of Columbia is a party or has a direct and substantial interest. Conclusion of 1970 opinion that federal attorneys may not represent even on a voluntary basis indigent persons asserting claims against the District, affirmed.

November 3, 1980

MEMORANDUM OPINION FOR THE STAFF DIRECTOR, FEDERAL LEGAL COUNCIL

This responds to your request on behalf of the Federal Legal Council for "an opinion as to whether [18 U.S.C. § 205] necessarily bars all federal attorneys from practice in any case in which the District of Columbia is a party or has a direct and substantial interest."

At the outset we wish to point out that this Department's position on the applicability of 18 U.S.C. § 205 to matters in which the District of Columbia is a party or has an interest does not stem from the fact that District criminal cases are handled by lawyers of the United States Attorney's Office. We originally took that position upon the enactment of § 205, and have consistently maintained it since then, because we concluded that § 205 requires it. We would maintain it even if the U.S. Attorney's Office were to withdraw completely from prosecutive work in the District.

The specific legal issue raised by the inquiry of the Council is whether a case involving the District is a "particular matter in which the United States is a party or has a direct and substantial interest" within the meaning of 18 U.S.C. § 205(2). This Office had occasion to rule on the issue formally a decade ago. Then it was raised by the former Civil Service Commission in relation to a proposal by the District of Columbia Chapter of the Federal Bar Association that District of Columbia and federal government attorneys be permitted to volunteer their representational services to indigent persons asserting claims against the District. Assistant Attorney General Rehnquist concluded, in a March 26, 1970 opinion, that such representation is barred by § 205 because a District matter is one "in which the United States is a party or has a direct and substantial interest." We find no basis for diverging from that opinion today.

We have also considered the suggestion that certain similarities in function between the District of Columbia government and that of a state provide the justification for allowing presently barred *pro bono* activities of federal attorneys before the District of Columbia courts. The suggestion evidences the view that the Department has the discretion to permit such activities. In truth, the Department has no power of that kind. Only Congress can reduce the scope of 18 U.S.C. § 205.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

Limitations on Presidential Authority To Control Export of Certain Hazardous Substances

The regulatory scheme imposed by certain statutes regulating specific hazardous substances for purposes of health and safety does not preclude the President from imposing export controls on those substances for foreign policy purposes under the Export Administration Act (EAA).

Section 17(a) of the EAA does not supersede other laws imposing export controls, but expressly recognizes the effect of such other laws; controls under the EAA thus may exist side-by-side with controls imposed pursuant to other laws.

Insulating the vast range of products which are subject to domestic health and safety regulations from export controls would defeat the goals of the EAA relating to national security, foreign policy, and economic stability.

November 13, 1980

MEMORANDUM OPINION FOR THE DEPUTY COUNSEL TO THE PRESIDENT

This responds to your request for our opinion whether other statutes limit the President's authority under the Export Administration Act of 1979 (EAA), Pub. L. No. 96-72, 93 Stat. 503 (1979), 30 U.S.C. app. § 2401 (Supp. III 1979), to control exports of hazardous substances for foreign policy purposes. Your request further pursues the subject of our memorandum of April 11, 1980, for the Special Assistant to the President for Consumer Affairs, in which we found the general authority for such export controls but added a caveat noting that we did not address the effect, if any, of other statutes regulating hazardous substances.* The General Counsel to the United States Trade Representative has since expressed his opinion in a memorandum (hereinafter Memorandum) that the effect of certain of these statutes is to preclude the imposition of export controls under the EAA. We disagree with this reading of the statutes; and for the reasons that follow, we conclude that the President's authority under the EAA is not so limited.

In his Memorandum, the General Counsel states his view that certain statutes currently controlling the products as to which export controls are being considered contain "express provisions" permitting exports of the products.[1] The General Counsel therefore concludes that export

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*NOTE: The text of the April 11, 1980, memorandum appears in this volume at p. 568. Ed.

[1] The Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 381(d)(1); the Public Health Service Act, 42 U.S.C. § 263f(a)(3); the Consumer Product Safety Act, 15 U.S.C. § 2067 (Supp. II 1978); the

Continued

controls under the EAA would be inconsistent with its statutory language and would intrude upon congressional authority under Article I, § 8, clause 3 of the Constitution to regulate foreign commerce. The inconsistency is asserted on the basis of § 17(a) of the EAA which provides that "[n]othing contained in this Act. . . . shall be construed to modify, repeal, supersede, or otherwise affect the provisions of any other laws authorizing control over exports of any commodity." 50 U.S.C. App. § 2416(a). By this section, the General Counsel finds that Congress has expressly excluded from controls under the EAA any commodity the export of which is provided for under any other law, including the seven specific statutes cited. And, in the face of the asserted congressional prohibition of export controls, he concludes that the Executive has no authority to regulate foreign commerce. We have examined the General Counsel's Memorandum and in our opinion none of its conclusions is correct.

I.

A. The General Counsel's Memorandum rests, at bottom, on the view that each of the seven statutes cited expressly authorizes export of the regulated products. We find no such express authorization.

The so-called export authorization cited under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 381(d)(1), provides that a food, drug, device, or cosmetic intended for export shall not be deemed to be adulterated or misbranded within the meaning of the law if it meets certain conditions for export including specification by a foreign purchaser, compliance with the laws of the importing country, and appropriate labeling. Section 381(d)(1) is thus not an express authorization of exports at all. It is nothing more than an exemption for exports from the regulatory scheme and the standards required for products intended for use in this country.

With minor differences in the requirements that must be met before the exemption from domestic standards will be available, the other cited provisions are to the same effect. Thus the Public Health Service Act requires labeling for export and compliance with the requirements of the importing country, 42 U.S.C. § 263f(a)(3) (electronic products emitting radiation); the Consumer Products Safety Act, labeling for export, no unreasonable risk to consumers within the United States, and notification to the Consumer Product Safety Commission of intent to export, 15 U.S.C. § 2067 (Supp. II 1978); the Federal Hazardous Substances Act, marking for exports, labeling in accordance with the specifications of the foreign purchaser and the laws of the foreign country, no unreasonable risk of injury to persons in the United States, and notifica-

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Federal Hazardous Substances Act, 15 U.S.C. § 1264(b) (Supp. II 1978); the Flammable Fabrics Act, 15 U.S.C. § 1202 (Supp. II 1978); the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136o (Supp. II 1978); the Toxic Substances Control Act, 15 U.S.C. § 2611.

tion to the Commission, 15 U.S.C. § 1264(b) (Supp. II 1978); the Flammable Fabrics Act, labeling for export, and no unreasonable risk to persons in the United States, and notification to the Commission, 15 U.S.C. § 1202(a), (c) (Supp. II 1978); the Federal Insecticide, Fungicide, and Rodenticide Act, preparation or packaging in accordance with the specifications of the foreign purchaser and, if applicable, a signed acknowledgment by the purchaser, with a copy to an appropriate official of the importing country, that the pesticide is not registered for use in the United States and cannot be used in the United States, 7 U.S.C. § 136o(a) (Supp. II 1978); and the Toxic Substances Control Act, labeling for export, no unreasonable risk of injury to health within the United States or to the environment of the United States, and in some cases notification to the Administrator of the Environmental Protection Agency of intent to export, 15 U.S.C. § 2611.

Nowhere in any of the above-referenced provisions is there any indication of an intent to confer an *absolute* right to export without regard to any other provisions of law.[2] There is merely an exemption from the domestic standards that would otherwise apply.[3]

B. In the absence of any express authorization for exports under these statutes, the further argument in the Memorandum as to the effect of § 17(a) of the EAA has not even the basis asserted therein. The continuing relevance of other laws providing for export, as § 17(a) is said to recognize, depends first on a finding that other laws in fact provide, in so many words, for export. We have concluded that the cited statutes do not. But even if they did, the effect of § 17(a) would not be to preclude controls under the EAA. The assertion in the Memorandum to the contrary greatly distorts the language of § 17(a).

First, § 17(a) does not address, as the Memorandum asserts, the relationship between the EAA and other laws that provide for export. Section 17(a), in fact, addresses the relationship between the EAA and laws that do affirmatively provide, just to the contrary, for export controls. The seven statutes cited cannot be at the same time laws expressly authorizing exports and laws authorizing controls over exports. Second, § 17(a) does not address, as the Memorandum asserts, the effect on further controls under the EAA even as to commodities that are controlled under other laws. Again, § 17(a) is addressed to just the contrary situation. The relationship is stated not in terms of the effect on controls under the EAA but in terms of controls under these other laws. And third, even as to these other laws, the effect is just the contrary of that stated in the Memorandum. Section 17(a) is not a preclusion of further controls at all. Instead, it expressly recognizes the effect of other controls.

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[2] In fact, § 2 of the Senate version of the EAA, which contained references to the "right of export," was amended to substitute the word "ability" for the word "right," *see* 50 U.S.C. App. § 2401(1), specifically to avoid the inference of "a constitutional or otherwise legally enforceable right to export free from government restriction." S. Rep. No. 169, 96th Cong., 1st Sess. 3-4 (1979) (hereinafter cited as "1979 Senate Report"). If any of these seven statutes had conferred a right to export, we think that it would have been mentioned at this point.

[3] Given the clarity of the language, we need not review the legislative history of the EAA, although we do note that there is no indication in the history that any of these seven statutes is an export control law. The House report states only that "[t]he Export Administration Act of 1969 constitutes the basic authority for controlling the export of most civilian products from the United States. (Related acts are the Arms Export Control Act, pertaining to the export of arms, ammunition, and implements of war, and the Nuclear Non-Proliferation Act of 1978, pertaining to the export of nuclear materials and technology.)" H.R. Rep. No. 200, 96th Cong., 1st Sess. 2-3 (1979) (hereinafter cited as "1979 House Report"). We also have no need to rely upon, although again we certainly do note, the well-settled rule that repeals by implication are not favored. *See, e.g., Morton* v. *Mancari*, 417 U.S. 535, 549 (1974).

C. With this statutory construction, the constitutional argument in the Memorandum also falls. The assertion that the Executive may regulate commerce only as Congress has provided, and thus may not take actions that Congress has expressly forbidden, is meaningless in the context of the EAA, which not only does not forbid the export controls contemplated here but in fact expressly authorizes them.[4]

II.

There are other significant reasons for our opinion that the regulatory scheme of the seven cited statutes does not preclude export controls for foreign policy purposes under the EAA. The argument to the contrary ignores the history of § 17(a), fails to take account of the effect of the argument on national security and short-supply controls, and represents a fundamental misunderstanding of the purpose and function of the EAA.

A. The provision that is now § 17(a) derives from § 10 of the Export Control Act of 1949, which provided:

> The Act of February 15, 1936 (49 Stat. 1140), relating to the licensing of exports of tinplate scrap, is hereby superseded; but nothing contained in this Act shall be construed to modify, repeal, supersede, or otherwise affect the provisions of any other laws authorizing control over exports of any commodity.

Pub. L. No. 81-11, § 10, 63 Stat. 7, 9 (1949). The legislative history of § 10 makes clear both the reason for the change in the law relating to tinplate scrap and the fact that no other changes in existing export control laws were made. Under prior law, the export licensing authority for tinplate scrap was conferred upon the Department of State but was, in practice, handled by the Department of Commerce. Section 10 had the effect of transferring the licensing authority to the agency that would administer the 1949 Act and also conforming the law to the prior practice. S. Rep. No. 31, 81st Cong., 1st Sess. 7 (1949). Yet there were in effect at the time of the 1949 Act export controls on other commodities, such as narcotics, gold, ammunition, arms, implements of war, tobacco seed, and atomic energy materials, H.R. Rep. No. 18, 81st Cong., 1st Sess. 12 (1949); the Senate report, *supra,* mentions helium also. As to these, "the bill makes no change whatever in the present laws." S. Rep. No. 31, *supra; see also* H.R. Rep. No. 18, *supra.*

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[4] We do not wish to be understood as conceding, however, that the Executive has no independent constitutional authority to regulate commerce for foreign policy reasons. Because the EAA clearly confers this authority by statute, we have no need to consider the constitutional question.

The Export Administration Act of 1969, Pub. L. No. 91-184, § 12(a), 83 Stat. 841, 846 (1969), retained verbatim the language of § 10. The 1979 Act deleted the language expressly superseding the prior law as to tinplate scrap but retained the language continuing the effectiveness of other laws authorizing control over exports. There is no explanation in the legislative history why the 1969 Act carried over the reference to tinplate scrap or why the 1979 Act deleted it, but the process is in any event not relevant to the issue here. What is important is that the 1979 Act retained in § 17(a) that portion of the prior provisions clearly stating the legislative intent that the EAA did not replace the regulatory authority existing pursuant to other laws.

By its literal terms, § 17(a) goes no further. As we noted above in discussing the construction given to § 17(a) in the Memorandum, the section does not address the effect, if any, of this other regulatory authority on the authority under the EAA. But in preserving the authority to impose controls pursuant to other laws, § 17(a), like its predecessors, creates a regulatory structure in which export controls under these other laws exist side by side with controls under the EAA. At least in the absence of any indication to the contrary in these other statutes, the reasonable conclusion to be drawn from the history of § 17(a), and the logical implication of the regulatory structure that results, is that controls under the EAA also may exist side by side with these other controls. As we discuss at length above, we find no such contrary indication in any of the seven statutes cited.

The Memorandum is addressed only to export controls imposed for foreign policy purposes. But the EAA also provides authority to impose controls in the interests of national security, or to prevent undue diminution of goods in short supply, 50 U.S.C. App. §§ 2404, 2406. The authority as to national security controls is conferred in furtherance of the congressionally declared policy of using export controls "to restrict the export of goods and technology which would make a significant contribution to the military potential of any other country or combination of countries which would prove detrimental to the national security of the United States." 50 U.S.C. App. § 2402(2)(A). As to short-supply controls, the export control authority is intended to implement the policy of using export controls "to protect the domestic economy from the excessive drain of scarce materials and to reduce the serious inflationary impact of foreign demand." 50 U.S.C. App. § 2402(2)(C).

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B. The Memorandum does not discuss the effect of § 17(a) on these national security or short-supply controls, but there is nothing in § 17(a) that would limit to foreign policy controls the effect attributed to that provision in the Memorandum. Under that interpretation, national security controls would be precluded merely because another statute imposed health and safety regulations on domestic distribution of a particular product but utilized a more lenient standard for exports. For this is all that the seven cited provisions do; and this, of course, protects the national security not at all. A health-and-safety regulatory scheme that included different standards for domestic distribution and export would similarly preclude short-supply export controls even though the other statute protected the national economy not at all. This interpretation of § 17(a) cannot be squared with the clear legislative intent as expressed in the congressional declarations of policy.[5]

C. In the final analysis, this result is the clearest indication that the view in the Memorandum must be rejected. In pursuit of national security, foreign policy, and economic stability, the EAA was intended to provide comprehensive authority for the control of exports. Nothing less would meet the stated goals of increasing the emphasis on national security, 1979 Senate Report at 4, and implementing "the full range of U.S. foreign policy goals," H.R. Rep. No. 482, 96th Cong., 1st Sess. 43 (1979) (1979 Conference Report) while at the same time minimizing uncertainty in export policy, increasing the efficiency of applicable administrative procedures, obtaining increased cooperation by our allies, and providing the Executive with the flexibility to react promptly and appropriately to extreme and varied situations. *See* 1979 Senate Report at 2–3, 8; 1979 House Report at 4–5; 1979 Conference Report at 43. Insulating a vast range of products from export controls would in one stroke defeat these goals and prevent any kind of a comprehensive and consistent export policy. And, as increased concern about health and safety requires expanded domestic regulation of hazardous substances, this approach would force the Executive to choose, on the one hand, between forgoing domestic regulation (or seeking in the course of such regulation export standards identical in all circumstances to domestic standards) or, on the other hand, retaining the authority to control exports as appropriate under the EAA. We cannot believe that Congress intended to force such a choice. The legislative history and the statements of findings and policy in the EAA are at odds with this interpretation and indicate instead that, where export controls under the EAA become important for reasons of national security, foreign policy, or short domestic supplies, the President would have the authority, notwithstanding any other statute that allows exports in the absence of one of these reasons, to impose those controls.

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[5] One additional indication that these health-and-safety regulations do not preclude the imposition of export controls under the EAA is the inclusion of § 6(f) of the Act, which provides that the EAA does not authorize controls on medicine or medical supplies, 50 U.S.C. App. § 2405(f). Although the products that fall within this exclusion might not be identical to those regulated under the Federal Food, Drug, and Cosmetic Act there is clearly some overlap. If 21 U.S.C. § 381(d)(1) had the effect that the Memorandum contends it has, § 6(f) would have been either omitted as unnecessary or at least phrased with reference to § 381(d)(1).

For all the foregoing reasons, we reject the view in the Memorandum that the seven statutes cited preclude the imposition of export controls pursuant to the EAA. We find no such preclusion and find instead the President's continuing authority under the EAA to control exports as appropriate.

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

Exclusion of Medicine and Medical Supplies From Controls Under the Export Administration Act of 1979

Congress intended the exclusion in § 6(f) of the Export Administration Act of 1979 for medicine and medical supplies to be absolute, and did not intend to limit it by imposing a strict standard of human need.

The President has broad discretion to determine whether particular exports are medicines or medical supplies within the exclusion, subject only to the limitation suggested by the concept of basic human need.

November 13, 1980

MEMORANDUM OPINION FOR THE SPECIAL ASSISTANT TO THE PRESIDENT FOR CONSUMER AFFAIRS

This responds to your request for our opinion as to the scope of the exclusion of "medicine or medical supplies" from export controls under the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979), 50 U.S.C. App. § 2401 (Supp. III 1979). In pertinent part, the exclusion in § 6(f) of the Act reads:

> (f) Exclusion for Medicine and Medical Supplies—
>
> This section does not authorize export controls on medicine or medical supplies. It is the intent of Congress that the President not impose export controls under this section on any goods or technology if he determines that the principal effect of the export of such goods or technology would be to help meet basic human needs. This subsection shall not be construed to prohibit the President from imposing restrictions on the export of medicine or medical supplies under the International Emergency Economic Powers Act.

50 U.S.C. App. § 2405(f). You have asked whether the exclusion is limited to only those "goods or technology . . . . the principal effect of which would be to help meet basic human needs"; and, if so, what is meant by the phrase "basic human needs"; and how and by whom the determinations of exclusion are to be made.

I. The Scope of the Exclusion

Your question concerning the scope of the § 6(f) exclusion (actually, the absence of authority to impose controls) arises because there is tension between the first and second sentences of the subsection as quoted above. The first sentence uses the phrase "medicine or medical supplies" in describing the goods and technology excluded from controls, while the second sentence defines the exclusion in terms of a standard of "basic human needs." Yet the Act defines neither phrase and does not otherwise indicate whether they are intended to have the same meaning. Because of this ambiguity, there are two possible readings of the effect of the two sentences together.

First, as you inquired, the second sentence could be read as limiting or further defining the first. Thus, although the first sentence seems to exclude from controls all medicine and medical supplies, the second sentence would limit the exclusion to medicine and medical supplies, the principal effect of which would be to help meet basic human needs. Alternatively, the second sentence might be read as merely explaining the basis for the absolute exclusion in the first sentence and would not impose a strict standard of human need on the exclusion. The question is not free from doubt, but we conclude that the latter interpretation is the better reading of the language of the subsection itself and is also more consistent with the sparse legislative history of the exclusion.

Initially, we note the interpretive problems that you suggested. As to the statutory language itself, the first sentence, the only operative language of the subsection, is phrased as an absolute exclusion. To read the second sentence as a limitation on this absolute exclusion would have the effect of giving greater weight to the language phrased merely as a statement of intent than to the operative language itself. Moreover, only if the standard of "basic human needs" encompasses less than all medicines and medical supplies could the question of limitation even arise; and, in the absence of definitions in the Act or the legislative history of "medicine or medical supplies" or of "basic human needs," it is not evident that the second sentence is a limitation on the first. Instead, Congress could have intended to convey its belief that all medicine and medical supplies would help meet a broadly conceived standard of basic human need. With regard to the majority of medicine and medical supplies, this belief would be supportable in fact. The possibility that there might exist some medical goods that would not be thought to meet a standard of basic human need no matter how broadly it was defined, should not prevent Congress from legislating on the basis of this presumption with regard to the entire class of goods.

There is little legislative history of § 6(f). The House version of the Export Administration Act originally contained an exclusion for food, medicine, and medical supplies. H.R. 4034, 96th Cong., 1st Sess. § 6(f) (1979) (discussed at 125 Cong. Rec. 24,034 (1979)). The House Report accompanying the bill, however, is not helpful concerning the question of interpretation, for it merely restates the language of the bill itself. H.R. Rep. No. 200, 96th Cong., lst Sess. 20 (1979). The Senate version of the Act, S. 737, 96th Cong., 1st Sess. (1979), contained no exclusion at all. The conference committee agreed to the House version with an amendment to make the exclusion apply only to medicine and medical supplies. Again, however, the conference report does no more than state this procedural history. H.R. Rep. No. 96-482, 96th Cong., 1st Sess. 46 (1979).

The hearings before the House subcommittee considering the bill are somewhat more revealing. Again, the discussion of the exclusion was not extensive; but we believe that what little discussion there was supports our interpretation that the second sentence of the subsection is an explanation and not a limitation. As originally proposed, the exclusion in the House bill was limited to the first two sentences of what is now § 6(f). It did not provide, as the third sentence of the subsection now does, that the exclusion "shall not be construed to prohibit the President from imposing restrictions on the export of medicine or medical supplies, under the International Emergency [Economic] Powers Act," 50 U.S.C. App. 2405(f) (referring to 50 U.S.C. § 1701 (Supp. I 1977)). William A. Root, Director of the Office of East-West Trade at the Department of State, objected to the subsection as proposed because it did not explicitly recognize the President's powers under the International Emergency Economic Powers Act. But there is no indication that Director Root understood § 6(f) as proposed to be other than an absolute exclusion. In fact, it was this understanding that led to his concern about the President's emergency powers. Specifically, Director Root testified:

> Proposed section 6(g) [now § 6(f)] would exclude food, medicine, and medical supplies from export controls authorized by this act for foreign policy purposes. Normally, controls need not extend to these items. However, there may arise instances where commercial exports even of food and medicine would not be in the national interest. There would be no objection to extending to the Export Administration Act the prohibition now contained in the [International] Emergency Economic Powers Act—section 203(b)(2) of Public Law 95-223—against controlling donations of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering, except to the extent that the President determines that such donations are in response to coercion against the proposed recipient or donor.

Extension and Revision of the Export Administration Act of 1969: Hearings and Markup on H.R. 2539 Before the Subcomm. on International Economic Policy and Trade of the House Comm. on Foreign Affairs, 96th Cong., 1st Sess. 648 (1979) (hereinafter cited as Hearings).

Remarks made during the markup session also support the interpretation that § 6(f) was intended to impose an absolute exclusion from controls. Representative Lagomarsino of California offered an amendment to strike the § 6(f) exclusion because he was concerned with the effect of the subsection on existing embargoes which included food, medicine, and medical supplies. But he was also concerned because he "[did] not think that we should be saying that under no circumstances under this act should we have a total solution or a total prohibition about embargoes on food, medicine, and medical supplies." Hearings at 774. Subcommittee Chairman Bingham of New York suggested that the amendment be considered in connection with an amendment proposed to eliminate the next subsection of the Act which provided that a total trade embargo was not authorized. Chairman Bingham explained:

> First of all, I think it is pretty clear this does not affect the existing embargoes against Cuba, Vietnam, Cambodia, and so on. They are authorized by other legislation. These paragraphs say this section does not authorize export controls of food, medicine, and so on. Basically it is my view that a total embargo is such an extreme measure that it ought to be specifically authorized by the Congress and not imposed by the administration, even though it may be subject to later veto by the Congress. That applies to a total embargo, and that applies to export controls on food, medicine, or medical supplies. These are extreme measures. Export controls on food and medicine are surely of the gravest importance, close to an act of economic warfare, and therefore it is my view that such action should be imposed by the Congress by law.
>
> * * * * *
>
> So leaving these two paragraphs in does not change the law. It simply clarifies the law. This does not change any existing controls on food and medicine or medical supplies. We simply say in effect that under this act the President cannot impose total embargo and he cannot impose economic controls of that character.

Id. at 774–75. Representative Bonker of Washington agreed:

> I would like to associate myself with the chairman's remarks, and retain for Congress the right to have full authority over controls. . . .
>
> . . . [T]here are many situations where we disagree totally with the political makeup of the government for

> whatever reasons, but yet this does not totally preclude our humanitarian commitment. I think in Southeast Asia, for instance, the Red Cross is supplying medical assistance and certain items for relief and for humanitarian purposes. So I think that the proposed change would impose unwarranted restrictions on our humanitarian commitment, even though we may disagree totally with the political makeup of particular countries. For these reasons I would have to oppose the amendment.

Id. at 775.

At this point, Director Root again explained the Administration's position:

> Mr. Chairman, as you know, the administration opposed both subsections (f) and (g) in testimony before your subcommittee earlier this month, largely for the reasons which Mr. Lagomarsino presented. With respect to subsection 6(f) we did indicate, and this addresses Mr. Bonker's point on humanitarian shipments, that we could accept language which was comparable to that now appearing in the International Emergency Economic Powers Act, which would read somewhat along the following lines:
>
> This section does not authorize export controls on donations of articles such as food, clothing, and medicine, intended to be used to relieve human suffering, except to the extent that the President determines that such donations are in response to coercion against the proposed recipient or donor.

Id. at 775. Again, it is clear that § 6(f) was understood to exclude entirely medicine and medical supplies, and, at the time, food, from controls under the Export Administration Act. The only change sought and obtained was express recognition that the President's emergency powers continued.

We recognize that our interpretation that the second sentence of § 6(f) explains but does not limit the first is not without its own difficulties. If an absolute exclusion results from the first sentence, Congress did not have to specify its intent in the second sentence. Moreover, if an absolute exclusion results, Congress did not have to specify the situation in which controls would be precluded, that is, when the principal effect of the exports would be to help meet basic human needs. But the tension noted above between the first and second sentences of § 6(f) precludes an interpretation free of all difficulties; and on balance we find that the problems with interpreting the second sentence as an explanation are less significant than are the problems with interpreting it as a limitation. First, as to the consequence that the statement of intent in the second sentence is rendered superfluous, the alternative would render superfluous the first sentence or at least its seemingly absolute character. If we must choose between the two, we should choose an interpretation that preserves that operative language of the statute even though it sacrifices the language of general intent. Second, as to the consequence that the second sentence would require a determination of the principal effect of the export that is irrelevant if no controls on medicine or medical supplies are authorized, we would offer the following saving interpretation.

II. By Whom Are the Determinations of Exclusion To Be Made

Initially, we should say in answer to your third question, namely, who is to make the determinations of exclusion, that § 6(f) confers upon the President the authority to make the determinations required under the subsection; or he may delegate his power, authority, and discretion under § 6(f) in accordance with the delegation provisions of § 4(e) of the Act, 50 U.S.C. App. § 2403(e). Because of our interpretation that § 6(f) imposes an absolute exclusion from controls on medicine and medical supplies, it remains to be discussed just what determinations § 6(f) requires or allows the President or his delegate to make.

III. The Meaning of the Exclusion

As we have interpreted § 6(f), medicine and medical supplies are absolutely excluded from controls on the ground that they are necessary to help meet basic human needs or at least that Congress thought so. A finding that the two standards are coterminous, however, leads to the further conclusion that the discretion conferred upon the President under § 6(f), although literally phrased as the determination whether the principal effect of exports would be to help meet basic human needs, is in fact the discretion to determine whether the exports are medicines or medical supplies. This interpretation avoids so far as possible a construction of the second sentence of § 6(f) as conferring discretion that cannot be exercised while at the same time not validating the exercise of discretion where it was not intended. The interpretation has the additional benefit of changing the definitional focus from the vague concept of "help[ing to] meet basic human needs" to the more concrete categories of "medicine or medical supplies."

This brings us to your second question. In the event that we found the scope of the exclusion limited by the standard of basic human needs, you asked what was meant by that phrase. In light of our conclusion that the exclusion is not so limited, the question is no longer pertinent. Instead, the appropriate standard of reference is "medicine or medical supplies."

As noted above, the Act does not define "medicine or medical supplies"; nor does the legislative history provide any guidance, except the general humanitarian sentiments expressed. But we have previously recognized that the Act provides the President great discretion and flexibility. In the absence of a definition specifically confining this general authority, the President may utilize his authority to the utmost extent and identify the contours of the exclusion subject only to the limitations imposed by humanitarianism suggested by the concept of basic human needs.[1]

LEON ULMAN
Deputy Assistant Attorney General
Office of Legal Counsel

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[1] In a memorandum opinion of today's date for the Deputy Counsel to the President, we conclude that the exemption of exports from domestic standards under the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 381(d)(1), and other statutes controlling hazardous substances does not preclude the imposition of export controls for foreign policy purposes. In light of that conclusion, the scope of the exclusion for "medicine or medical supplies" need not be defined by reference to the reach of regulatory authority under the Food, Drug, and Cosmetic Act. Indeed, we note that in the pursuit of health and safety under that Act, a regulatory scope significantly broader than a standard of "basic human needs" might be appropriate. [NOTE: The text of the Memorandum Opinion for the Deputy Counsel to the President immediately precedes this opinion, at p. 802. Ed.]

Adjusting the Census for Recent Immigrants: The Chiles Amendment

The Chiles Amendment authorizes the President to order a special census pursuant to 13 U.S.C. § 196, or to use some other method of obtaining a revised estimate of the population, whenever he determines that the population of a particular area is significantly affected by an influx of immigrants within six months of a regular decennial census date.

The Chiles Amendment was intended simply to remove an unfairly arbitrary element from the census, and not to serve as an indirect means of aiding jurisdictions affected by large numbers of recent immigrants. Accordingly, the entire population of significantly affected jurisdictions must be estimated, in order to take into account both the recent influx of immigrants and any offsetting recent population decline.

December 11, 1980

MEMORANDUM OPINION FOR THE ASSISTANT TO THE PRESIDENT FOR INTERGOVERNMENTAL AFFAIRS

This responds to your request for our opinion on certain issues raised by the Chiles Amendment, § 118 of Pub. L. No. 96–369, 94 Stat. 1351, 1357 (1980). The Chiles Amendment provides:

> Notwithstanding any other provision of law, when the President determines that a State, county, or local unit of general purpose government is significantly affected by a major population change due to a large number of legal immigrants within six months of a regular decennial census date, he may order a special census, pursuant to section 196 of title XIII of the United States Code, or other method of obtaining a revised estimate of the population of such jurisdiction or subsections of that jurisdiction in which the immigrants are concentrated. If the President decides to conduct a special census, it may be conducted solely at Federal expense.

You have suggested that the Chiles Amendment might be interpreted in one of two ways. On one interpretation, the President has only the authority to conduct a special census, either under 13 U.S.C. § 196 or in some other way. Alternatively, the amendment might be interpreted to give the President authority to order some other method of revising population figures that is different from a special census. You have asked our opinion on which of these possible interpretations is correct.

We believe the latter interpretation is correct. The Chiles Amendment permits the President to order either a special census or to obtain in some other way "a revised estimate of the population" of certain jurisdictions. 126 Cong. Rec. 27,551 (1980). We recognize that this interpretation is not necessarily suggested by the amendment's syntax; it would read the amendment to provide that the President "may order a . . . other method of obtaining a revised estimate of the population." *Id.* But we nonetheless believe that the amendment authorizes the President to order that some method other than a special census be used.

The Chiles Amendment was added by the Senate committee. The original version contained the first sentence of the provision that became law, followed by these two sentences:

> Any such special census [or] [1] revised estimate shall be conducted at Federal expense. Such special census or revised estimate shall be conducted no later than twelve months after the regular census date. . . .

126 Cong. Rec. 27,551 (1980). *See also* 126 Cong. Rec. 27,746 (1980); 126 Cong. Rec. 28,503 (1980). This language was deleted for no stated reason—the deletion was referred to on the floor of the House as "a slight modification of the Senate language," *see* 126 Cong. Rec. 28,504 (1980) (remarks of the Speaker)—but it suggests that, despite the syntax, Congress intended the first sentence to give the President a choice between a special census and some "other method of obtaining a revised estimate of the population." *Id.*

The Senate committee's explanation of its amendment removes any remaining doubt. It reads:

> The Committee adopted a new section . . . to allow the President to order a special census count *or use other means of revising census estimates* in those special situations where there is a large flow of legal immigrants within 6 months of the census enumeration, such as the recent influx of Cubans and Haitians. Where such a revision of census estimates occurs, the revised data shall be used for all normal purposes, including Federal funding formulas.

126 Cong. Rec. 27,554 (1980) (emphasis added). We believe that the Chiles Amendment, read in light of this committee explanation, authorizes the President to choose some method other than a special census to obtain a revised population estimate.

Your office has expanded upon your initial request by asking our views on what would qualify as an "other method of obtaining a revised estimate of the population." In particular, you want our views on whether the President can simply order that the number of immigrants who entered a "significantly affected" jurisdiction within six months after a decennial census date—in this case, April 1, 1980—be added to the official census population, ascertained as of the most recent estimate or census from which data can be used for that jurisdiction. The possible objection to this method is that it ignores other population changes in the affected jurisdiction—for example, some affected jurisdictions may have lost population if the influx of immigrants was more than offset by a population decline resulting from other causes—and therefore is not an "estimate of the population."

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[1] The word "of" appears in the original; this is evidently a misprint for "or."

We believe that the Chiles Amendment authorizes the President only to estimate the entire population of significantly affected jurisdictions. If there is reason to believe that adding the number of recent immigrants to the previous census figure will not accurately estimate the population of a jurisdiction, then the Chiles Amendment does not authorize such a method in that jurisdiction.

We can discern two purposes that the Chiles Amendment, or a measure like it, may have been intended to serve. Congress may have intended it simply as a means of funneling aid from federal programs based on population data, to jurisdictions with large numbers of recent immigrants. Congress may have felt that jurisdictions with large numbers of new immigrants have special problems and burdens even if their overall population has not increased. If this were Congress' objective, it would be acceptable—perhaps necessary—simply to add the number of new immigrants to the previous population figures, even if this method artificially inflated the population figures for certain jurisdictions.

Alternatively, Congress may have intended the Chiles Amendment to be a means of correcting an arbitrary feature of the census. The census does not count immigrants who enter a jurisdiction after April 1, 1980, although it would have counted them if they had entered before that date. Of course, some such arbitrariness is inevitable; but Congress may have believed that if very large numbers of immigrants were involved, the arbitrariness would be unfair and should be corrected. Congress may have believed that a census or estimate taken shortly after the immigrants had arrived would be more fair. If this was Congress' intention—to remove an unfairly arbitrary element from the census figures—then the President must attempt accurately to estimate the total population. He cannot simply add the number of new immigrants to the earlier population figures in cases in which he has reason to believe that such a method will not produce an accurate estimate.

Since, as we said, some jurisdictions may have large numbers of new immigrants but lose population overall, these two possible congressional purposes diverge to some extent; and to that extent, we believe Congress intended the latter objective. That is, it intended the Chiles

Amendment to reduce the arbitrariness of the census, not simply to serve as a means of aiding jurisdictions affected by large numbers of immigrants. We reach this conclusion for several reasons. First, we know of no instance—and the General Counsel's Office at the Department of Commerce advises us that it knows of none—in which Congress has tampered with the integrity of census figures in order to achieve other policy objectives. In the absence of a clear indication to the contrary, we will not assume that Congress intended to do so here. Second, the language of the Chiles Amendment—"a revised estimate *of the population*" (emphasis added)—suggests that Congress wanted the President to order a genuine effort to estimate the overall population. Indeed, if Congress intended artificially to inflate population figures, it is difficult to see why it authorized "a special census . . . of the jurisdiction"—not merely of the new immigrants—as one alternative.[2] Finally, Congress has enacted a carefully designed program providing aid to localities in dealing with some of the special burdens and problems associated with large populations of recent immigrants. *See* Pub. L. No. 96-422, 94 Stat. 1799 (1980) (Refugee Education Assistance Act of 1980). Since such a program exists, and is more carefully tailored to serve the purposes of aiding affected jurisdictions than the Chiles Amendment is, we doubt that Congress intended the Chiles Amendment to serve that purpose instead of the purpose for which it seems more clearly designed.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

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[2] In the only floor discussion of any length about the Chiles Amendment, Representative Garcia did say: "The number of legal aliens counted in this special census [authorized by the Chiles Amendment] would then be added to the official census figures and used for all legal purposes." *See* 126 Cong. Rec. 28,503 (1980). But Representative Garcia had no special qualification to speak authoritatively about the meaning of the Chiles Amendment; he was not, for example, a sponsor of the amendment. More important, his remark on this point was tangential to the principal subject of his statement on the floor, which was to make the point of order that a proposed amendment to the Chiles Amendment was not germane. Notably, Representative Garcia also said:

> The Senate amendment is limited to situations such as the unprecedented influx of Cuban refugees who were lawfully admitted into the country after the census got underway. Senator Chiles' amendment is limited in scope and addresses a unique problem not heretofore encountered in the census.

Id. This remark was much more directly related to the principal subject of Representative Garcia's statement—he was characterizing the Chiles Amendment in order to raise the point of order—and this remark reinforces our interpretation of the Chiles Amendment.

Litigating Authority of the Office of Federal Inspector, Alaska Natural Gas Transportation System

The statutory assignment to the Attorney General of plenary responsibility for the conduct of litigation involving the United States furthers a number of important policy goals, and exceptions to this plenary grant will be narrowly construed.

The Office of Federal Inspector (OFI) of the Alaska Natural Gas Transportation System has no general power to conduct litigation, although it is possible that OFI may have a degree of specific authority derived from the independent litigating authority of agencies whose enforcement powers were transferred to OFI by Reorganization Plan No. 1 of 1979.

The Attorney General may not delegate or transfer his authority and responsibility to supervise and control litigation, by way of a memorandum of understanding or otherwise, to an agency, like OFI, that does not independently possess litigating authority; however, attorneys from OFI may participate in litigation as part of a team headed by attorneys from the Department of Justice.

December 11, 1980

MEMORANDUM OPINION FOR THE ASSOCIATE ATTORNEY GENERAL

You have asked us certain questions regarding the litigating authority of the Office of Federal Inspector (OFI) of the Alaska Natural Gas Transportation System. We conclude that OFI has no general authority to conduct litigation, but that it may possibly have specific, limited authority derived from agencies which have litigating powers independent of the Department of Justice. We further conclude that the Department of Justice may not enter a memorandum of understanding with OFI transferring litigating authority to that agency.

I.

First, you have asked for our opinion as to whether OFI has any independent litigating authority, deriving either from the Alaska Natural Gas Transportation Act of 1976 (ANGTA), 15 U.S.C. § 719, or the Reorganization Plan No. 1 of 1979, 15 U.S.C. § 719(e) (Supp. III 1979) (Reorganization Plan).

It is useful to review some basic principles in answering this question. Traditionally, the Attorney General has exercised plenary responsibility over the conduct of all litigation on behalf of the United States. *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 279 (1888); *Confiscation*

Cases, 74 U.S. (7 Wall.) 454, 457–58 (1868). This responsibility was first given statutory recognition in the act which created the Department of Justice, 16 Stat. 162 (1870), and is now primarily codified at §§ 516 and 519 of Title 28, which reserve the conduct of litigation involving the United States to the Attorney General and the Department of Justice "[e]xcept as otherwise authorized by law."[1]

This assignment of plenary authority to the Attorney General centralizes the conduct of litigation on behalf of the United States and thereby furthers a number of important policy goals. It allows the presentation of uniform positions on important legal issues, ensures that government lawyers will be able to select test cases which present the government's position in the best possible light, and gives the Attorney General authority over lower court proceedings so that government litigation will be better handled on appeal and before the Supreme Court. It provides for greater objectivity in the filing and handling of cases by attorneys who are not themselves affected litigants. And it facilitates presidential supervision over executive branch policies implicated in litigation.[2]

Because of the strong policies favoring control of litigation by the Attorney General, the "otherwise authorized by law" exception in §§ 516 and 519 is construed narrowly as permitting litigation by agencies other than the Department of Justice only when statutes explicitly so provide. *Marshall* v. *Gibson's Products, Inc. of Plano*, 584 F.2d 668, 676 n.11 (5th Cir. 1978); *ICC* v. *Southern Ry Co.*, 543 F.2d 534, 536 (5th Cir. 1976); *United States* v. *Tonry*, 433 F. Supp. 620, 622 (E.D. La. 1977). A statutory grant of power to "bring a civil action" is not in itself conclusive evidence that an agency possesses litigating authority.[3] What is generally required is language authorizing agencies to use their own attorney to represent them in court.[4] The question, therefore, is whether there is any provision of law which thus explicitly vests litigating authority in OFI.

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[1] Section 516 provides:

> Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

Section 519 provides:

> Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

See also 5 U.S.C. § 3106, which states in pertinent part:

> Except as otherwise authorized by law, the head of an Executive department or military department may not employ an attorney or counsel for the conduct of litigation in which the United States, an agency, or employee thereof is a party, or is interested, or for the securing of evidence therefor, but shall refer the matter to the Department of Justice.

[2] *See generally ICC* v. *Southern Ry Co.*, 543 F.2d 534, 536 (5th Cir. 1976); Office of Legal Counsel, Memorandum to the Director, Office of Management and Budget (November 29, 1973).

[3] *Compare FTC* v. *Guignon*, 390 F.2d 323 (8th Cir. 1968), *with SEC* v. *Robert Collier & Co.*, 76 F.2d 939 (2d Cir. 1935).

[4] *See, e.g.*, 16 U.S.C. § 825m(c) (Federal Power Commission); 12 U.S.C. § 1464(d)(1) (Federal Home Loan Bank Board).

Such authorization exists, if at all, in the Reorganization Plan, which established OFI and transferred to it certain functions of other federal agencies.[5] Section 102 of the Reorganization Plan vests in OFI "exclusive responsibility for enforcement of all Federal statutes relevant in any manner to pre-construction, construction, and initial operation" of the approved transportation system. 15 U.S.C. § 719(e). "Enforcement" is defined to "includ[e] monitoring and any other compliance or oversight activities reasonably related to the enforcement process." Section 102 then lists approximately 50 statutory authorities exercised by seven federal agencies: the Environmental Protection Agency; the Army Corps of Engineers; the Department of Transportation; the Department of Energy; the Department of the Interior; the Department of Agriculture; and the Department of the Treasury. With respect to each of the statutory authorities, the transferred functions "include all enforcement functions of the given agencies or their officials under the statute as may be related to the enforcement of such terms, conditions, and stipulations [under federal authorizations], including but not limited to the specific sections of the statute cited." Finally, as relevant here, § 102(h)(l) vests in OFI "[t]he enforcement functions authorized by, and supplemental enforcement authority created by [ANGTA]."

These provisions nowhere contain the explicit language needed to divest the Attorney General of his otherwise plenary control over federal litigation. To be sure, the word "enforcement" might possibly be read so broadly as to encompass litigation. But such a construction would be inconsistent with the ordinary understanding of that term as used in federal statutes and regulations. There are a host of agencies, large and small, with statutory "enforcement" powers, but this authorization has never been interpreted to constitute a grant of litigating authority. If it were, the reservation of litigation to the Attorney General in §§ 516 and 519 would be largely vitiated.

That "enforcement" does not encompass litigation is evident from the Reorganization Plan's transfer to OFI of the "supplemental" enforcement powers in ANGTA. ANGTA's supplemental enforcement powers, which are contained in § 11 thereof, are limited to issuing compliance orders or requesting the *Attorney General* to commence a civil action. 15 U.S.C. § 719i.[6] If OFI possessed independent litigating authority by virtue of the transfer of enforcement powers, it is unlikely indeed that it would need an additional and "supplemental" power to request the Department of Justice to institute a suit.

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[5] Previously, the Alaskan oil pipeline project had employed a federal inspector to supervise construction. In ANGTA, Congress instructed the President, *inter alia,* to appoint an officer or board to serve as federal inspector of an approved natural gas transportation system. As contemplated in § 7(a)(5) of ANGTA, 15 U.S.C. § 719e(a)(5), the federal inspector's duties were restricted to monitoring and oversight and clearly did not include litigation. The President further expanded the federal inspector concept by proposing to grant certain powers over the terms and conditions to be included in federal permits and other authorizations. *Alaska Natural Gas Transportation System: Message from the President of the United States Transmitting His Decision and Report on an Alaskan Natural Gas Transportation System,* H.R. Doc. No. 225, 95th Cong., 1st Sess. 197–200 (1977). Like ANGTA, however, the President's decision itself cannot plausibly be read as empowering OFI to engage in litigation.

Finally, our research has uncovered no references in the legislative histories either of ANGTA, the President's decision, or the Reorganization Plan indicating that any of the participants—be they the President, the members of the congressional committees, or the witnesses at committee hearings—believed that the federal inspector or OFI possessed general litigating authority. If such a far-reaching grant of authority had been contemplated, at least some reference to this fact would have been included in these legislative histories. For the above reasons, therefore, we conclude that OFI possesses no general litigating authority.[7]

II.

You have also asked whether the Attorney General, under §§ 516 and 519, has authority to transfer litigating authority by way of a memorandum of understanding to agencies that do not possess litigating authority.

In the absence of any general provision of law permitting an agency to transfer its statutory authority to another agency, such transfers or delegations may normally be accomplished only by legislation or by executive reorganization under the Reorganization Act. *See* 5 U.S.C. § 903(a). We have already concluded that the Reorganization Plan did not itself transfer litigating authority from the Department of Justice to OFI, and we see nothing in that Plan which can be read as authorizing the Attorney General to delegate such authority. Nor do the statutes generally applicable to the Department of Justice empower the Attorney General to delegate authority to other agencies. Indeed, the implication of these statutes is clearly to the contrary. Section 516 states that, except as otherwise authorized by law, the conduct of government litigation is "reserved" to officers of the Department of Justice. Section 519 in terms imposes a mandatory duty on the Attorney General to supervise all litigation involving the United States, except as otherwise authorized by law. The policy of ensuring centralization of litigation which underlies §§ 516 and 519 is furthered by a rule prohibiting delegation outside the Department of Justice.

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[6] More specifically, § 11(a) provides:

> In addition to remedies available under other applicable provisions of law, whenever any Federal officer or agency determines that any person is in violation of any applicable provision of law administered or enforceable by such officer or agency or any rule, regulation, or order under such provision, including any term or condition of any certificate, right-of-way, permit, lease, or other authorization, issued or granted by such officer or agency, such officer or agency may—
>
> (1) issue a compliance order requiring such person to comply with such provision or any rule, regulation, or order thereunder, or
>
> (2) bring a civil action in accordance with subsection (c) of this section.

15 U.S.C. § 719i(a). Subsection (c) provides in pertinent part:

> Upon a request of such officer or agency, as the case may be, the Attorney General may commence a civil action for appropriate relief, including a permanent or temporary injunction or a civil penalty not to exceed $25,000 per day for violations of the compliance order issued under subsection (a) of this section. . . .

15 U.S.C. § 719i(c).

[7] It is possible that OFI may enjoy a degree of specific authority derived from independent litigating authority previously exercised by a federal agency other than the Department of Justice and transferred to OFI by the Reorganization Plan. That issue is beyond the scope of our present inquiry and would require an examination of any existing independent litigating authority exercised by any of the agencies that transferred functions to OFI pursuant to the Reorganization Plan.

Generally speaking the Attorney General may not enter into a memorandum of understanding or other arrangement delegating litigating authority to an agency that does not independently possess such authority.[8] The Attorney General may delegate litigating authority where specifically authorized to do so by federal statute or by legislative history unequivocally expressing congressional intent to permit delegation. For example, we believe that authority to conduct litigation may be delegated when a statute provides that the Attorney General may authorize an agency to appear in court under his overall control and supervision. There is, however, no language in the materials relevant to OFI that can be read to supersede the Attorney General's general obligation not to delegate his responsibility outside the Department of Justice.[9]

Given that the Attorney General may not delegate his litigating authority to OFI, the question arises as to what role, if any, attorneys from OFI could play in that agency's litigation. It is evident that the Attorney General may not transfer to OFI any powers either to "supervise" (§ 519) or to "conduct" (§ 516) litigation. Thus, attorneys from OFI may not exercise general supervisory powers over a case or class of cases. Nor may they take trial level responsibility for handling a particular case. However, we believe that attorneys from OFI may participate in depositions, witness examinations, arguments, briefings, and all other forms of trial preparation and presentation as part of a litigation "team" headed by an attorney or attorneys from the Department of Justice. This would not amount to an impermissible delegation of the power to "conduct" litigation so long as an attorney from the Department of Justice participates actively in the litigation in all its phases and retains final say over all significant trial decisions, including but not limited to stipulations of facts, removal of issues from the case, compromise, and dismissal. The Department of Justice has frequently engaged in this "team" approach to litigation, and we see no legal objection to the practice.[10]

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[8] On the other hand, an agreement establishing "agreed boundaries" between the Department of Justice and an agency possessing independent litigating authority would appear entirely permissible. For example, OFI and the Department of Justice could enter into an agreement with respect to those litigating authorities, if any, which the Reorganization Plan transferred to OFI from agencies other than the Department of Justice. A like arrangement could be used to establish the point at which administrative proceedings within OFI's competence end and judicial proceedings within the sphere of the Department of Justice begin.

[9] The Department of Justice currently operates under a number of memoranda of understanding and other informal agreements dividing litigating responsibility with other agencies. Although we have not studied the subject exhaustively, it appears that those agreements are authorized by federal statute or are otherwise permissible as not amounting to delegations of authority. Several of these memoranda are collected in the Department's Civil Division Practice Manual, at § 3-28.

JOHN M. HARMON
Assistant Attorney General
Office of Legal Counsel

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[10] Alternatively, one or more attorneys from OFI could be appointed to act as special attorneys or special assistants within the Department of Justice. *See* 28 U.S.C. §§ 543, 515. Such attorneys would be able to conduct litigation or to supervise the conduct of a case or class of cases.

Emergency Assistance to the District of Columbia Department of Corrections in Case of a Work Stoppage

Under 31 U.S.C. § 685a(a), which authorizes federal agencies to provide services on a contractual basis to the District of Columbia government, the Attorney General may provide Bureau of Prisons personnel to the District of Columbia Department of Corrections in the event of a work stoppage by Department employees.

December 22, 1980

MEMORANDUM OPINION FOR THE ASSISTANT ATTORNEY GENERAL, CRIMINAL DIVISION

This responds to your request for our opinion whether the Attorney General may, if requested to do so by the Mayor of Washington, D.C., provide Bureau of Prisons (BOP) personnel to the District of Columbia Department of Corrections in the event of a work stoppage by Department employees. We have concluded that the Attorney General does have the authority to provide such assistance.

The federal government is authorized to furnish services to the District of Columbia government. 31 U.S.C. § 685a(a).[1] Requiring explicit statutory authorization for each agency's rendering of services to the District of Columbia would render this statute superfluous. Unless, therefore, there is some impediment in the BOP's regulations to providing such services which is itself based upon a statutory prohibition, the statute would permit the Mayor and BOP to negotiate a contract, subject to the approval of the Office of Management and Budget and the Mayor.

BOP, a part of the Department of Justice, is charged with guarding federal prisoners. 18 U.S.C. § 4042(2), (3); 28 C.F.R. § 0.95(b), (c). The

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[1] The provision, which is also found at D.C. Code Ann. § 1-826 (Supp. V 1978), states:

> (a) For the purpose of preventing duplication of effort or for the purpose of otherwise promoting efficiency and economy, any Federal officer or agency may furnish services to the District government and any District officer or agency may furnish services to the Federal Government. Except where the terms and conditions governing the furnishing of such services are prescribed by other provisions of law, such services shall be furnished pursuant to an agreement (1) negotiated by the Federal and District authorities concerned, and (2) approved by the Federal Office of Management and Budget and by the Mayor.
>
> * * * * *
>
> (c) The cost of each Federal officer and agency in furnishing services to the District pursuant to any such agreement are [sic] authorized to be paid, in accordance with the terms of the agreement, out of appropriations available to the District officers and agencies to which such services are furnished.

Attorney General's authority to control and manage federal prisons, 18 U.S.C. § 4001(b)(1), has been delegated to the Director of the BOP. 28 C.F.R. § 0.95(a). We are advised that there have been only two incidents in the recent past in which BOP personnel have been assigned to work away from their normal post. One occurred during an antiwar demonstration when personnel from Lewisburg Prison and the central Washington, D.C. office were used to man a federal detention center set up in the District of Columbia. In the other, personnel from the central office were sent to Danbury Prison because of a threatened work stoppage.

The Master Agreement between the BOP and its guards' union reserves to BOP the right "(1) to direct employees of the Federal Prison System; (2) to . . . transfer [and] assign . . . employees . . . and (6) to take whatever actions may be necessary to carry out the mission of the Federal Prison System in situations of emergency." Article 5, 9a. *See also* Article 18, § m. The authority, therefore, to transfer guards to temporary duties in time of emergency does exist.

Larry L. Simms
Deputy Assistant Attorney General
Office of Legal Counsel

Applicability of the Compact Clause to Use of Multiple State Entities Under the Water Resources Planning Act

Agreements between the federal government and a state are not subject to congressional consent under the Compact Clause, U.S. Const. Art. I, § 10, cl. 3; nor are all agreements between or among states so subject, but only those which encroach upon or interfere with the authority of the federal government.

States may engage cooperatively in a broad range of planning activities under the Water Resources Planning Act without obtaining congressional consent, so long as they impose no legal obligation or disability on governmental or private parties.

Congress has given advance consent to planning activities of the statutory river basin commissions, but not to those of interagency committees or multiple state entities.

December 30, 1980

MEMORANDUM OPINION FOR THE ACTING DIRECTOR, UNITED STATES WATER RESOURCES COUNCIL

This responds to your request for our opinion regarding the constitutionality, under the Compact Clause,* of using federal-state interagency committees or multiple state entities as sponsors for the preparation of Regional Water Resource Management Plans. For the reasons stated below, we conclude that there is a broad, although not unlimited, range of planning activity that can be undertaken without the consent of Congress. Consent is required only when two or more states agree among themselves to impose some legal obligation or disability on state or federal governments or private parties.

I.

Pursuant to the Water Resources Planning Act, 42 U.S.C. § 1962, your agency coordinates and funds the development of comprehensive Regional Water Resource Management Plans (plans). The Act authorizes establishment of river basin commissions, comprised of members from state, interstate, federal, and international agencies. The Commissions enter funding contracts with your agency to act as plan sponsors. They develop the various plan elements, submit draft plans to a wide variety of interested parties for comment, and prepare final plans reflecting the comments received. They approve final plans on a consensus basis, *i.e.*, with all members either voting affirmatively or abstaining, and transmit approved plans to your agency and participating states. Your agency reviews the plans [1] and forwards them to the Office of Management and Budget, which reviews the plans and transmits them to Congress.

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*NOTE: The Compact Clause, U.S. Const. Art. I, § 10, cl. 3, provides that "[n]o State shall, without the consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign power. . . ." Ed.

Existing plans are not legally binding on the participants or private parties. At the state level, a plan is implemented when individual states determine to follow its recommendations in budget and other matters. Our understanding is that states usually do abide by plan provisions, especially since they participate in plan development and exercise veto authority during the approval process, but that individual states do from time to time refuse to follow a given plan in some respects. At the federal level, implementation occurs by application of your agency's Consistency Policy, which requires the Army Corps of Engineers, the Department of Agriculture, and the Department of the Interior to inform the Office of Management and Budget of those particulars in which certain of their programs and projects are inconsistent with approved plans and to provide reasons satisfactory to the President for any inconsistency.[2] The strictures the Consistency Policy imposes on the federal government result from your agency's voluntary action.

To date, river basin commissions have been established for areas covering only about half of the Nation. You have sought to remedy this deficiency, in part, by contracting with agencies established by interstate compact. More recently, you have begun exploring the possibility of contracting with interagency committees or other multiple state entities to sponsor plans for regions of the United States not presently covered by commissions or compact agencies. Interagency committees are comprised of state and federal agencies; they help coordinate government programs but possess few, if any, other powers.[3] Other multiple state entities could assume a variety of forms.[4] Interested governmental agencies could take the leadership role. Alternatively, the states could coordinate their efforts, with either a state or federal agency joining together to establish an interstate nonprofit corporation along the lines of a council of governments.

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[1] *See* Water Resources Council, Review of Regional Water Resource Management Plans (1980).

[2] *See* Water Resources Council, Policy Statement No. 4: The Utilization of Comprehensive Regional Water Resource Management Plans (1978).

[3] At least three interagency committees are presently operating: the Arkansas-White-Red Basins Interagency Committee, the Pacific Southwest Interagency Committee, and the Southeast Basins Interagency Committee. Water Resources Council, Improving the Planning and Management of the Nation's Water Resources 53–54 (1980).

[4] *See* Report to the Water Resources Council, Potential Interstate Institutional Entities for Water Resource Planning 12 (1980).

II.

The comprehensive planning process can aptly be described as an exercise in "cooperative federalism."[5] Each step involves complex relationships between the federal government and the states and among the states *inter se*. In determining whether congressional consent is required under the Compact Clause, it is necessary to examine closely the nature and legal impact of the various agreements involved in the planning process.

We believe that agreements between the federal government and a state or states need not be submitted for congressional consent. The states, which possess all powers of government not withdrawn from them by the Constitution or delegated by the Constitution to the federal government,[6] are not barred by the Compact Clause from entering into individual or joint agreements with the United States. To the contrary, the Compact Clause, by prohibiting unconsented agreements with other states or with foreign powers, at least by negative implication contemplates that federal-state agreements need not be submitted for consent. The Framers may well have omitted federal-state agreements because they believed that in such cases the party negotiating on behalf of the United States could protect the federal interest.[7] It would also run counter to the fundamental constitutional principle of separation of powers to give either house of Congress the equivalent of a veto over agreements concluded by an executive branch agency. 43 Op. Att'y Gen. No. 25 (1980).** Because the Compact Clause is inapplicable to federal-state agreements, your agency need not obtain consent for its funding contracts with regional sponsors, or for any other obligations, such as the Consistency Policy, which might be included as express or implied terms of such contracts.

The planning process also involves agreements among the states *inter se*. Not all such agreements are subject to the Compact Clause, but only those "tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." *Virginia* v. *Tennessee*, 148 U.S. 503, 519 (1893).[8] Interstate agreements interfere with federal power in this sense if: (1) they involve a subject matter which the Congress is competent to regulate, *see*

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[5] *Cf.* Grad, *Federal-State Compact: A New Experiment in Cooperative Federalism*, 63 Colum. L. Rev. 825 (1963).

[6] U.S. Const. Amend. X.

[7] The records of the Constitutional Convention furnish no light on the meaning or purposes of the Compact Clause. For discussions of the historical meaning of the Clause's terms, *see generally* Frankfurter & Landis, *The Compact Clause of the Constitution: A Study of Interstate Adjustments*, 34 Yale L.J. 685 (1925); Comment, *What Did the Framers of the Federal Constitution Mean by "Agreements or Compacts?"*, 3 U. Chi. L. Rev. 453 (1936).

**NOTE: The cited Attorney General's opinion is reprinted in this volume at p. 30 *supra*. Ed.

[8] *Accord*, *United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452, 467–71 (1978); *New Hampshire* v. *Maine*, 426 U.S. 363, 369 (1976); *Stearns* v. *Minnesota*, 179 U.S. 223, 246 (1900); *Louisiana* v. *Texas*, 176 U.S. 1, 17 (1900); *Wharton* v. *Wise*, 153 U.S. 155, 169–171 (1894).

Wharton v. *Wise*, 153 U.S. 155, 171 (1894); and (2) they purport to impose some legal obligation or disability, *see United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. 452, 467–71 (1978).

These principles permit the states to engage in a broad range of planning activities without obtaining congressional consent. Although water resources planning is undoubtedly within congressional power under the Commerce Clause, *see Kaiser Aetna* v. *United States*, 444 U.S. 164, 173 (1979); *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377, 426–27 (1940), many aspects of the planning process do not impose a legal detriment on state or federal governments or private parties. The states may agree, without congressional consent, to create, fund, and participate in a regional sponsor empowered to prepare and adopt a plan, so long as each state is free to accept or reject a plan or any of its provisions and has the unfettered power to withdraw from the regional sponsor. *See United States Steel Corp.* v. *Multistate Tax Commission*, 434 U.S. at 473–78. Furthermore, nothing prevents the states, acting independently, from adopting a plan as legally binding within their own territories. The test is whether the state action is truly independent or whether it is made instead in return for reciprocal action by other states. Congressional consent would be required, however, for any plan calling for joint construction or operation of any facility. Similarly, consent would be required if the regional sponsor possessed any legally effective authority, regulatory or otherwise, to ensure the plan's implementation by state or federal governments or private parties.

The Weeks Act, 16 U.S.C. § 552, grants advance congressional consent to interstate compacts, not in conflict with federal law, whose purpose is "conserving the forests and the water supply of the States entering into such agreement or compact." Although broad in scope, the Weeks Act does not amount to a congressional abandonment of its duty to review all interstate compacts.[9] Congress may delegate its lawmaking authority so long as it provides some articulated standard to guide agency action. By analogy, so long as it defines the category with some specificity, Congress should be able to determine that a given type of interstate compact poses so little threat to federal interests that advance categorical consent may be granted. The Weeks Act consents to the preparation and implementation of a forests and water supply element as an initial stage of the comprehensive planning process. But it does not consent to broader plans designed for other purposes, such as regulating navigation, controlling floods, conserving fish and wildlife, abating water pollution, and enhancing water-related recreation.[10]

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[9] *But see* Muys, *Interstate Compacts and Regional Water Resources Planning and Management*, 6 Natural Resources Lawyer 153, 174 (1973).

[10] *See* Water Resources Council, Improving the Planning and Management of the Nation's Water Resources 30 (1980).

The Water Resources Planning Act, we believe, grants advance congressional consent to plans drawn up by river basin commissions, since in authorizing creation of these agencies Congress was careful to protect federal interests.[11] But the Act does not similarly protect federal interests when plans are sponsored by interagency committees or multiple state entities.[12] Indeed, the Act nowhere specifically mentions the possibility of such agencies acting as plan sponsors.[13] Although it appears that federal participants in some of these agencies might adequately protect federal interests in a given case, it is highly doubtful that Congress consented in advance to all agreements made by regional sponsors, other than river basin commissions, in which the federal interests happen to be represented "adequately."

III.

Much can be accomplished without congressional consent. A multiple state entity or an interagency committee may be formed, funded, and authorized to sponsor a plan, so long as participating states retain unfettered discretion to withdraw from the arrangement. The regional sponsor may promulgate a plan, so long as it is merely advisory in nature and there is nothing to stop individual states from independently adopting the plan as legally binding within their territories. A forest and water conservation element could be prepared that imposes legal strictures on the affected states or private parties. The federal government may choose to impose strictures on itself. Indeed, there is no legal obstacle to the development of plans which would require congressional consent when implemented. All that is required is that consent to such plans be obtained at some time before they become effective in ways which impair or threaten to impair a federal interest.

LARRY L. SIMMS
Deputy Assistant Attorney General
Office of Legal Counsel

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[11] Title II of the Act, 42 U.S.C. § 1962b, creates a detailed scheme for allocating state and federal power within a river basin commission. River basin commissions are established by the President, at the request of a state or your agency, but only with the concurrence of at least one-half of the affected states. § 201(a). The chairman of a river basin commission is a federal representative chosen by the President, § 202(a), while the vice chairman is chosen by the states. § 203(b). The members include representatives from states, federal departments or agencies, compact agencies, and international commissions. § 202(b)–(c). River basin commissions operate on a consensus basis, thus giving both federal and state representatives veto power over agency action. § 203(d). Finally, with respect to plans prepared by river basin commissions, the Act sets forth a detailed procedure for comment by affected parties, review by your agency, and transmittal to the President and the Congress. § 204(3).

[12] With respect to compact commissions, the original congressional consent to the interstate compact should extend to the comprehensive planning process so long as the original compact granted the compact commission power to engage in this type of planning.

[13] You have not asked us to examine the statutory bases for your agency's authority to designate bodies other than river basin commissions as regional sponsors, or for its power to subject plans prepared by these bodies to the review procedures ordinarily given river basin commission plans.

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